Before the Commodity Futures Trading Commission

June 8, 2012

Application for an Exemptive Order Under Section 4(c)(6) of the Commodity Exchange Act, in Accordance with Sections 4(c)(1) and 4(c)(2)

INTRODUCTION

The National Rural Electric Cooperative Association ("NRECA"), the American Public Power Association ("APPA"), the Large Public Power Council ("LPPC"), the Transmission Access Policy Study Group ("TAPS"), and Bonneville Power Administration ("BPA")(collectively, the "Applicants") respectfully request that the Commodity Futures Trading Commission (the "Commission" or the "CFTC") grant the exemptive relief requested herein pursuant to Section 4(c)(6) of the Commodity Exchange Act ("CEA"),[1] in accordance with Section 4(c)(1) and 4(c)(2), for the benefit of all "NFP Electric Entities" as defined in this Application.

I. RELIEF SOUGHT AND ORGANIZATION OF THIS APPLICATION

The Applicants seek an order exempting all "Electric Operations-Related Transactions" (as that term is defined in **Section III** below) entered into between "NFP Electric Entities" (as that term is defined in **Section IV** below) from the requirements of the CEA as amended by the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (the "Dodd-Frank Act"),[2] and for certain ancillary relief requested herein. As demonstrated below, such an exemptive order is consistent with the public interest and the purposes of the CEA, as required by CEA Section 4(c)(6). The requested exemptive order is also consistent with the Congressional intent of the Dodd-Frank Act amendments to the CEA.

The Commission is authorized and directed under CEA Section 4(c)(6) to exempt from the requirements of the CEA "an agreement, contract or transaction that is entered into… (C) between entities described in section 201(f) of the Federal Power Act (16 U.S.C. § 824(f))("FPA 201(f)")," upon making certain "public interest" determinations and "in accordance with Sections 4(c)(1) and 4(c)(2)."[3]

FPA 201(f) describes certain government-owned electric utilities and electric cooperatives.[4] Such entities are exempt from the plenary jurisdiction of the Federal Energy Regulatory

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1 7 U.S.C. 6(c)(6).

2 Pub. L. No. 111-203, 124 Stat. 1376 (2010).

3 The reference to "public interest" determinations comes from the Dodd-Frank Act, where the heading of Section 722(f) of the Dodd-Frank Act, which added new Section 4(c)(6) to the CEA, is "Public Interest Waiver." See **Section V** below for important differences between this new CEA Section and CEA Sections 4(c)(1) and 4(c)(2) which set forth exemption authority and requirements in the pre-Dodd-Frank Act CEA.

4 16 U.S.C. § 824(b)(1). A copy of Section 201 of the FPA, including FPA 201(f), is included in **Exhibit 1**. The policy underlying FPA 201(f) is explained in **Section IVA** below.

Commission ("FERC") over "public utilities" in Part II of the Federal Power Act. FERC has also determined that federally-recognized Indian tribes that own or operate electric facilities should be considered as entities described in FPA 201(f). In this Application, the Applicants refer to these entities collectively as "FPA 201(f) entities."

The Applicants also request that the Commission determine, as it is permitted to do in accordance with Sections 4(c)(2)(B) and 4(c)(3)(K) of the CEA, that certain entities that are not FPA 201(f) entities are nevertheless "appropriate persons," and entitled to the benefits of the exemptive order. There are a small number of "electric cooperatives"[5] that do not, or may not from time to time, meet certain specific additional criteria for electric cooperatives described in FPA 201(f). In this Application, the Applicants refer to these electric cooperatives collectively as "non-FPA 201(f) electric cooperatives."

The FPA 201(f) entities and the non-FPA 201(f) electric cooperatives are referred to in the Application collectively as "NFP Electric Entities." All the NFP Electric Entities share a public service mission to provide reliable, affordable electric service to their constituents, and have a common not-for-profit governance model for operating their electric facilities and managing their operations. NFP Electric Entities are effectively self-regulating entities, and are distinguishable from other types of entities that are regulated by FERC as "public utilities" as defined in Section 201 of the FPA, including investor-owned electric utilities.

The Applicants request that the exemptive order granted be categorical in nature, both in terms of the transactions exempted and in terms of the entities exempted. The Applicants explain below why such categorical exemptions are contemplated by the statutory language of CEA Section 4(c)(6).

This Application is organized as follows:

Section II briefly describes the Applicants and, for each of the trade association Applicants, describes its members. In accordance with Section 4(c)(1), the Commission may grant an exemption by rule, regulation or order on its own initiative or on application by any person, including an association or associations.

Section III describes certain types of "Electric Operations-Related Transactions" that are outstanding now, or that may be executed in the future, between NFP Electric Entities.[6] The Applicants also provide illustrative examples of Electric Operations-Related Transactions

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[5] Under state law, electric cooperatives are sometimes called "electric membership corporations" or "electric power associations." In certain sections of the tax laws, various state public utility laws or regulations, the Federal Power Act or the Federal Energy Regulatory Commission's regulations, electric cooperatives are sometimes called "rural electric cooperatives" or "cooperatives providing electric services to consumers and farmers" or by similar, but not identical, entity names. When the Applicants use the term "electric cooperatives" in this Application, we mean all of these entities which are formed and continue to operate for the primary purpose of providing electric service to their owners/members on a not-for-profit, cooperative basis, and which are treated as cooperatives under the Federal tax laws.

[6] For purposes of the remainder of the Application, we will use the term "NFP Electric Entities" to describe the type of entity that will be the beneficiary of the exemptive order. Note that, in Section IVB below, we explain why non-FPA 201(f) electric cooperatives are "appropriate persons" to be included in the defined term "NFP Electric Entities" and entitled to the benefit of the exemptive order.

between NFP Electric Entities. The Applicants circumscribe the transactions for which this exemptive order is requested by identifying in the definition the "swap" asset class and product categories of Electric Operations-Related Transactions (anticipating that the exemptive order will expressly exclude other asset classes and product categories), and by restricting this Application to those agreements, contract, transactions or arrangements that are ***not*** executed, traded or cleared on a "registered entity," as that term is defined in the CEA.

Section IVA describes the statutory underpinnings and historical precedent for limited Federal energy regulatory oversight of FPA 201(f) entities, in light of their "self-regulating" public service entity structure, their not-for-profit status,[7] and their unique role in the generation, transmission and distribution of electric energy in the United States.

Section IVB describes non-FPA 201(f) electric cooperatives – and explains why these entities are "appropriate persons" to be included within the definition of "NFP Electric Entities" in accordance with Section 4(c)(2) and 4(c)(3)(K)of the CEA.

Section V establishes that: (i) the statutory exemption in new CEA Section 4(c)(6) is intended to be categorical in nature, both in terms of the transactions and entities covered; (ii) the requested exemptive order is consistent with the public interest; (iii) the requested exemptive order is consistent with the purposes of the CEA, and (iv) the requested exemptive order is consistent with the Congressional intent of the Section 4(c)(6) "public interest waiver" provisions, added to the CEA by the Dodd-Frank Act.

Section VI explains why the exemptive order should not be subject to limitations, and why the NFP Electric Entities should not be subject to additional regulatory conditions in respect of the Electric Operations-Related Transactions between NFP Electric Entities, the vast majority by number of which are "small entities" under the Regulatory Flexibility Act ("RFA"), as amended by the Small Business Regulatory Enforcement Fairness Act ("SBREFA"), 5 U.S.C. §§ 601 *et seq*.

Finally, **Section VII** requests that the Commission grant the requested exemptive order promptly, to reduce ongoing and unnecessary regulatory uncertainty for NFP Electric Entities.

II. THE APPLICANTS

NRECA is the national service organization for more than 900 not-for-profit rural electric cooperatives and government-owned power districts. NRECA's members provide electric energy to approximately 42 million consumers in 47 states, or 13 percent of the nation's population.

APPA is the national trade association that represents the interests of government-owned electric utilities in the United States. APPA's member utilities are not-for-profit utility systems

[7] The Applicants use the term "not-for-profit" to describe the NFP Electric Entities generally, and to distinguish this sector of the electric utility industry from "for-profit" entities owned by investors or shareholders. The government or government-owned entities, including the Indian tribes, are typically tax exempt entities. The electric cooperatives, and other NFP Electric Entities that are wholly-owned by NFP Electric Entities, are typically formed under state nonprofit entity codes or specific electric cooperative laws, and are treated as cooperatives or other types of tax exempt or not-for-profit entities under the Federal tax laws.

that were created by state or local governments to serve the public interest. Approximately 2,000 government-owned electric utilities provide over 15% of all KWh sales to retail electric customers.

LPPC is an organization representing 24 of the largest government-owned electric utilities in the nation. LPPC members own and operate over 86,000 megawatts of generation capacity and nearly 35,000 circuit miles of high voltage transmission lines, representing nearly 90% of the transmission investment owned by non-Federal government-owned electric utilities in the United States.

TAPS is an association of transmission dependent electric utilities located in more than 30 states. All of TAPS member electric utilities except one are FPA 201(f) entities.

BPA is a self-financed, non-profit Federal agency created in 1937 by Congress that primarily markets electric power from 31 federally owned and operated projects, and supplies 35 percent of the electricity used in the Pacific Northwest. BPA also owns and operates 75 percent of the high-voltage transmission in the Pacific Northwest. BPA's primary statutory responsibility is to market its Federal system power at cost-based rates to its "preference customers."[8] BPA also funds one of the largest wildlife protection and restoration programs in the world.

III. ELECTRIC OPERATIONS-RELATED TRANSACTIONS

The Applicants respectfully request that the Commission grant the exemptive order for all "Electric Operations-Related Transactions" ***between*** NFP Electric Entities, retroactive to the enactment of the Dodd-Frank Act, outstanding now, or that may be executed in the future. For the reasons set forth in this Section, the Applicants recommend that the Commission adopt the following definition of "Electric Operations-Related Transactions:"

> "Electric Operations-Related Transaction" shall mean any agreement, contract or transaction involving a "commodity" (as such term is defined in the CEA) and whether or not such agreement, contract or transaction is a "swap," so long as the NFP Electric Entity is entering into any such agreement, contract or transaction "to hedge or mitigate commercial risks" (as such phrase is used in CEA Section 2(h)(7)(A)(ii)) intrinsically related to the electric facilities or electric operations (or anticipated facilities or operations) of the NFP Electric Entity, or intrinsically related to the NFP Electric Entity's public service obligation to deliver reliable, affordable electric energy service to electric customers. For the avoidance of doubt, "intrinsically related" shall include all transactions related to (i) the generation, purchase or sale, and transmission of electric energy by the NFP Electric Entity, or the delivery of reliable, affordable electric energy service to the NFP Electric Entity's electric customers, (ii) all fuel supply for the NFP Electric Entity's electric facilities or operations, (iii) compliance with electric system reliability obligations applicable to the NFP Electric

[8] BPA has 130 preference customers made up of electric utilities which are not subject to the jurisdiction of the Federal Energy Regulatory Commission ("FERC"), including Indian tribes, electric cooperatives, and state and municipally chartered electric utilities, and other Federal agencies located in the Pacific Northwest.

> Entity, its electric facilities or operations, (iv) compliance with energy, conservation or renewable energy or environmental statutes, regulations or government orders applicable to the NFP Electric Entity, its electric facilities or operations, or (v) any other electric operations-related agreement, contract or transaction to which the NFP Electric Entity is a party. Electric Operations-Related Transactions shall ***not*** include agreements, contracts or transactions executed, traded, or cleared on a registered entity, nor shall such defined term include an agreement, contract or transaction based or derived on, or referencing, a "commodity" in the interest rate, credit, equity or currency asset class, or of a product type or category in the "Other Commodity" asset class that is based or derived on, or referencing, metals, or agricultural commodities or crude oil or gasoline commodities of any grade not used as fuel for electric generation.

The Applicants request that the exemptive order be categorical in nature in terms of the transactions covered, rather than transaction-specific or contract-specific. There are significant differences among NFP Electric Entities in terms of the electric facilities that each such entity owns and/or operates, and the size, scope and characteristics of the electric operations each such entity manages. The geographic location, fuel type used for generation, transmission system interfaces, number and size of facilities and facility ownership structure all affect the electric-operations-related ("commercial") risk management decisions of the particular NFP Electric Entity. In addition, the size and complexity of electric operations, the geographic region and weather patterns affecting the NFP Electric Entity's operations, distribution facilities, and the number and type of retail electric customers (residential, commercial, industrial) served will all have an effect on electric operations-related transactions.[9]

As a result, each NFP Electric Entity engages in Electric Operations-Related Transactions that are customized "to hedge or mitigate commercial risks"[10] that arise from its unique electric facilities and electric operations and its obligations to provide reliable, affordable electric service to retail electric customers in its unique geographic region. It is impractical to describe each Electric Operations-Related Transaction, or to describe every type or category of Electric Operations-Related Transaction that may be executed between pairs of such different NFP Electric Entities located throughout the United States and for which the exemptive order is requested. Nothing in CEA Section 4(c)(6) requires such a description. In fact, the clear language of the statute, as amended by the Dodd-Frank Act, anticipates a categorical transaction exemption.

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[9] For examples of the diversity of assets, operations, geographic regions and customers served, see the profiles attached to the pre-NOPR comment letter filed by the "Not-for-Profit Energy End User Coalition" to the Capital and Margin Task Force, dated December 14, 2010 available at http://www.cftc.gov/ucm/groups/public/@swaps/documents/dfsubmission/dfsubmission5_121410-0017.pdf. None of these profiles purport to be "typical" of the large, medium or small entities that are NFP Electric Entities (measured by assets or number of retail electric customers). The differences among NFP Electric Entities are simply too complex to categorize, measure or compare. Nonetheless, all fall within the definition of "NFP Electric Entity."

[10] This phrase is used herein with the meaning given to it in Section 2(h)(7)(A)(ii) of the CEA to describe the commercial risk management activities of a nonfinancial entity entitled to utilize the "end-user exception" to clearing for "swaps" to which it is a party.

In granting the exemptive order, the CFTC need not determine whether Electric Operations-Related Transactions are (or are not) subject to the CEA. The Commission has considerable flexibility in exercising its exemptive authority under Section 4(c). During the legislative process leading up to the initial enactment of CEA Section 4(c), the House-Senate Conference Committee stated that "the Conferees do not intend that the exercise of exemptive authority by the Commission would require any determination beforehand that the agreement, instrument or transaction for which an exemption is sought is subject to the Act."[11]

Accordingly, the Applicants respectfully request that the Commission issue the exemptive order ***without*** making a determination whether the Electric Operations-Related Transactions are swaps, futures (contracts of sale of a commodity for future delivery) or options within the meaning of Section 1a of the CEA, without making a determination of whether the Electric Operations-Related Transactions are "trade options" within the meaning of Interim Final Rule 32.3,[12] and without making a determination whether any of the goods, services, rights or interests referenced in an Electric Operations-Related Transaction is a "commodity" within the meaning of Section 1a of the CEA.

The following Electric Operations-Related Transaction types are currently outstanding, or may be outstanding,[13] between NFP Electric Entities. Each transaction type involves goods or services which may or may not be a "commodity," and such agreement, contract, transaction or arrangement may or may not be an "option," or a "trade option, or fall within the definition of "swap," or be excluded from the definition of "swap" by Section 1a(47)(B)(ii) of the CEA. For each type of Electric Operations-Related Transaction the Applicants have also provided one or more detailed examples in **Exhibit 2**.

A. "Electric Energy Delivered"

Two NFP Electric Entities often agree for one such entity to provide another such entity with electric energy delivered to an identified geographic service territory, load or electric system. Since electric energy is not currently storable in commercial quantities, the delivery aspect is critical to the transaction – electric energy delivered elsewhere is not usable or valuable for the receiving entity's operational needs. The terms of such bilateral transactions vary widely depending on the assets and operational capabilities of the provider NFP Electric Entity and the needs and operations characteristics of the recipient NFP Electric Entity. Bilateral transactions of this type may contain a few pages of basic contract terms or hundreds of pages of complex operations-related terms and conditions (including engineering formulas).

These bilateral transactions may contain one or more standardized terms used without definition between utility operators in the geographic region that have worked together for decades, or may be documented using industry contract language or form transaction templates that are

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11 *See* "*Order Exempting the Trading and Clearing of Certain Credit Default Products Pursuant to the Exemptive Authority in Section 4(c) of the Commodity Exchange Act* (''CEA'')," 72 Fed Reg. 33,205 (2007) ("*4(c) Exemption Order*"), at 33,206.

12 See 77 Fed. Reg. 25,338 (April 27, 2012).

13 The details of some of the examples are hypothetical, to illustrate in relatively few examples some of the myriad permutations and combinations in ordinary course transactions related to electric operations that may be viewed as involving a "commodity," as that term is defined in the CEA.

then adapted for use between the two NFP Electric Entities. The use of standardized terminology or legal provisions should not be confused as resulting in "standardized" agreements, contracts and transactions, which are "tradeable" or "fungible" or that can be easily described in numeric data elements and electronically reportable formats. Each is a highly customized transaction, uniquely suited to the particular pair of NFP Electric Entities which are the bilateral contract parties.

Some of the transactions may include delivery locations within the geographic boundaries of an RTO or an ISO, while other transactions will include delivery locations outside an RTO or ISO region.[14] The electronic trading facilities owned or operated by the RTO or ISO may or may not be used to execute the transaction between NFP Electric Entities. Where the delivery location is within the geographic boundaries of an RTO or ISO, electric delivery facilities on the interconnected electric grid or interfaces between electric transmission or distribution facilities that are managed by an RTO or ISO (but owned by other entities) may or may not be used to effect delivery from one NFP Electric Entity to the other NFP Electric Entity at the time delivery is required.

This transaction category includes the most prevalent type of Exempt Electric Operations-Related Transaction between NFP Electric Entities, *i.e.*, the "full requirements" contract, or "all requirements" agreement or arrangement[15] that is often executed between a generation and transmission ("G&T") cooperative and each of its constituent NFP Electric Entity members/owners, or between a Joint Action Agency and each of its constituent NFP Electric Entity members.[16] In some instances, the G&T cooperative or the Joint Action Agency is formed by its constituent members for the singular purpose of providing its constituent members with their "full requirements" for electric energy to be delivered over time – as required to deliver reliable electric service to the constituents' retail electric customers.

In such an arrangement, the provider NFP Electric Entity agrees, by bilateral contract or in some long-standing relationships by arrangement within the juridical documents of the G&T cooperative or Joint Action Agency as the provider NFP Electric Entity, that it will provide to a recipient NFP Electric Entity its "full requirements" to provide reliable electric service to the recipient's fluctuating electric load over an agreed delivery period at one or multiple delivery points or locations. In some cases, the delivery period, term or "tenor" of such agreements can be for thirty years or more.[17]

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[14] Note that, as transmission owners form or join a particular RTO or ISO, or move from one RTO or ISO to another, the geographic boundaries of any particular RTO or ISO may shift. For that reason, NFP Electric Entities and other electric entities often use more specific delivery locations for their longer-term transactions.

[15] The "full" or "all" requirements agreement or contract is a negotiated, bilateral commercial arrangement that is customized to the two NFP Electric Entities that are parties thereto.

[16] See **Section IVA** for more information about Joint Action Agencies and the different types of electric cooperatives.

[17] BPA's Electric Operations-Related Transactions with its "preference customers," including other NFP Electric Entities, are complex arrangements to provide preference and priority in the purchase of low-cost Federal power. Such Electric Operations-Related Transactions with other NFP Electric Entities share characteristics with many of the categories of Electric Operations-Related Transactions described in **Section III**. In the Commission's "Definition of 'Swap'" docket, BPA has submitted a comment letter asking

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In addition to providing the recipient's full requirements for electric energy, the arrangement may also include providing services that are ancillary to the delivery of the electric energy, such as operating or dispatching one or more of the recipient's owned generation units, generation capacity or balancing services, or any of the other goods, services or commodities required by the recipient described under other categories below.

The volume or quantity of electric energy delivered will also vary during the delivery period. If a recipient NFP Electric Entity owns some generation assets itself, the volume or quantity of supplemental electric energy or capacity required to meet its "full requirements" during some seasons, months or days of the year (net of its owned generation) may be zero. In other words, the volumetric optionality may vary from "full requirements" to "zero" during the course of the agreement, contract, transactions or arrangement. Some ancillary services or "commodities" under such a transaction or arrangement may also be optional. Pricing may vary on a seasonal, monthly, daily or on peak/off peak basis, or may be tied to the cost at which the provider NFP Electric Entity can generate or purchase electric energy, or the price may be tied to the fuel that the provider uses for generating the electric energy provided.

Examples of two "full requirements" arrangements between NFP Electric Entities are provided in **Exhibit 2 at p.1**.

B. Generation Capacity

The term "generation capacity" (or "generating capacity") is used by electric operations personnel in various geographic regions of the United States to mean different things in different contexts. Use of the term varies among NFP Electric Entities located in each of the seven Independent System Operators ("ISOs") and Regional Transmission Organizations ("RTOs").[18] Each ISO/RTO is responsible for managing the high-voltage electric transmission assets of its member utilities and for administering certain "market(s)" for wholesale electric energy and related goods and services in the geographic region it serves, under its FERC tariffs (or, for ERCOT, its PUCT tariffs). Each of the ISO/RTOs also provides reliability planning for the bulk electricity system in its geographic region. Some RTOs have standardized a definition of what a "capacity contract" means for that specific RTO's purposes, and each RTO will have specific

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the Commission to clearly exclude from the definition of "swap" certain arrangements that BPA is required by statute to maintain with regional electric utilities *other than* NFP Electric Entities, under its "Residential Exchange Program." A copy of the comment letter is found at: http://comments.cftc.gov/PublicComments/ViewComment.aspx?id=47927&SearchText=bonneville.

[18] More information is available at http://www.ferc.gov/industries/electric/indus-act/rto.asp. The current ISO/RTO entities operating in North America are PJM Interconnection, Midwest Independent Transmission System Operator, Southwest Power Pool, ISO New England, California ISO, New York Independent System Operator and the Electric Reliability Council of Texas (ERCOT). Each of these entities, other than ERCOT, was either formed at the direction of FERC or designated by FERC to direct the operation of the regional electric transmission grid in its specific geographic area. ERCOT is comprehensively regulated by the Public Utility Commission of Texas (the "PUCT").

tariff provisions establishing the centralized "capacity markets" (if any) that it administers.[19] All such tariffs are subject to change, under the ongoing regulatory oversight of FERC or the PUCT.

Among utilities, including NFP Electric Entities, located in geographic areas outside the geographic region or "footprint" of the RTOs,[20] the term "capacity" may mean something similar or something completely different. Use of the term also varies under different state utility regulations and resource adequacy planning programs. Maximum generation capacity of a generating unit ("nameplate capacity") does not mean the same thing as average on-peak generation contribution of a generator or class of generation to reliability ("capacity value"). The term "capacity" is also sometimes used to mean the right to call on generation under certain specified conditions. Electric operations professionals may reference any of these as "capacity" agreements, contracts, transactions or arrangements.[21]

When two NFP Electric Entities agree that one will provide "generation capacity" or "capacity" for another, a mutual understanding of the engineering context or a customized bilateral commercial contract further defines the parties' respective rights and obligations. Generation capacity is always location-specific and is monitored by the RTOs or ISOs or, outside the RTO/ISO regions, by balancing authorities or reliability coordinators under the supervision of the North American Electric Reliability Corporation (NERC) and the FERC. Deliverability of generation capacity to a particular geographic point or electric system interface is such an important concept that FERC requires each RTO, ISO and balancing authority to establish a framework of engineering studies to demonstrate/confirm that a particular generation unit's electrical energy output is "deliverable." If generation capacity from a particular unit does not satisfy the relevant RTO, ISO or balancing authority's deliverability requirements, that "generation capacity" has no value in meeting reliability requirements in that reliability area. If generation capacity is purchased from a generation unit located outside the relevant reliability area, the correlated electric energy (which, if "called on," must be delivered) must nonetheless be "deliverable."

Any agreement, contract or transaction regarding generation capacity is intrinsically tied to reliability requirements in a particular geographic region. The "value" of the transaction is idiosyncratic to those with the localized reliability obligation, and the value, in an operational sense, fluctuates with the load projections for the region, the generation expected to be available in the geographic region, and the weather forecast for the region. It is highly unlikely that there could exist a "trading market" with any measurable market liquidity for a specific "generation capacity" agreement, contract or transaction executed between two NFP Electric Entities.

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19 Capacity contracts executed in certain RTO/ISO regions are defined by means of the RTO/ISO tariff on file with FERC, and the rights and obligations of parties to such capacity contracts remain subject to FERC's ongoing regulatory oversight.

20 Approximately 172 million electric consumers are located within the geographic region or "footprint" of one of the currently-recognized ISOs/RTOs (excluding ERCOT). See, *2010 ISO/RTO Metrics Report, Appendix C,* available at http://www.ferc.gov/industries/electric/indus-act/rto/rto-iso-performance.asp.

21 The concept is distinguishable from "transmission capacity," which relates to the limited amount of electric energy transmission available over the interconnected electric transmission grid, and which is generally defined as a measure of the transfer capability or "capacity" remaining in the physical electric energy transmission network for further commercial activity over and above already committed uses.

Some generation capacity agreements or arrangements among NFP Electric Entities may include operational reserves attributable to the identified generation unit. A generation capacity agreement or arrangement may also be called a "shared resources agreement," whereby NFP Electric Entities agree to conditionally share capacity resources as needed. The contract may relate to multiple identified units owned or operated by both NFP Electric Entities. For example, some state or regional programs to manage the limited generation capacity and maintain voltage support for the electric grid in a geographic area may allow NFP Electric Entities subject to such program to utilize "demand-side resources" as part of the generation capacity required by the specific balancing authority or to meet the reliability authority's requirements in the relevant geographic region.

In general, a "generation capacity" transaction between two NFP Electric Entities in one region cannot be presumed to be "fungible" with any other generation capacity transaction between two other NFP Electric Entities, even in the same region. Examples of three "generation capacity" agreements between NFP Electric Entities are provided in **Exhibit 2 at p. 2**.

C. Transmission Services

Electric transmission services transactions between NFP Electric Entities also vary by geographic region, and by assets owned and transmission services required by the operations of different NFP Electric Entities. In some cases, these electric transmission services agreements include congestion management services, system losses and ancillary services. Some NFP Electric Entities own significant transmission facilities – for example, BPA owns 75 percent of the transmission lines in the Pacific Northwest. In some cases, Federal law and the regulations pursuant to which the Federal power agencies are formed and operate require a particular Federal power agency to allocate a portion of the transmission to particular electric entities, including NFP Electric Entities, located within its geographic area.

In certain areas of the country, the RTOs/ISOs control allocation of transmission assets, rights and services, and the individual owners of transmission assets do not have the ability to engage in bilateral services arrangements involving those transmission assets, which are under RTO/ISO management and control. In other areas of the country, historical transmission services agreements, including those between NFP Electric Entities, are "grandfathered" from the RTO/ISO rules and procedures otherwise applicable to electric transmission services in that region. An example of a transmission services agreement between two NFP Electric Entities is provided in **Exhibit 2 at p. 3**.

D. Fuel Delivered

The electric facilities owned and operated by NFP Electric Entities vary widely in terms of the fuel used by such facilities for generation. Some NFP Electric Entities also provide fuel procurement (and delivery) services to other NFP Electric Entities that own generation assets. Fuel types may include such nonfinancial commodities as coal, natural gas, uranium products, heating oil, biomass, or waste products such as wood chips, tires, or manure or other agricultural waste or byproducts. In addition to the fuel "commodity," one NFP Electric Entity may provide to another NFP Electric Entity other types of services related to the fuel commodity, such as fuel transportation, including pipeline transportation, rail, barge and truck, fuel storage, or fuel waste handling and storage services.

One NFP Electric Entity may manage for another NFP Electric Entity the operational basis or exchange (location/time of delivery) risk that arises from the recipient's NFP Electric Entity's location-specific, seasonal or otherwise variable operational need for fuel delivered. The provider NFP Electric Entity may or may not provide such services for NFP Electric Entities other than those with which it is directly "affiliated,"[22] or for non-NFP Electric Entities. If the provider acts for other NFP Electric Entities, it likely does so only for those in the immediately adjoining geographic region. An example of a "fuel delivered" agreement between NFP Electric Entities is provided in **Exhibit 2 at p. 3**.

E. Cross-Commodity Transaction

Two NFP Electric Entities may also enter into cross commodity (fuel/electric energy) transactions and options, including heat rate transactions, and tolling arrangements, whereby the electric energy delivered to the recipient NFP Electric Entity is priced with reference to the fuel source used or useable by the provider NFP Electric Entity for generating such electric energy. Alternatively, the price paid for the fuel by the recipient NFP Electric Entity may be calculated in reference to the amount of electricity that the recipient NFP Electric Entity generates using such fuel. An example of a cross-commodity transaction between NFP Electric Entities is provided in **Exhibit 2 at p. 4**.

F. Other Goods and Services Agreements, Contracts and Transactions

NFP Electric Entities share their common not-for-profit public service obligations in ways that make the agreements, contracts and transactions among them unlike similar arrangements that may exist between for-profit nonfinancial businesses, including investor-owned electric utilities. These agreements may involve sharing property rights, equipment, supplies and services, including construction, operation, and maintenance agreements, facilities management, construction management, energy management or other energy-related services related to the electric facilities owned by, or operations of, one or both of the Exempt Energy Entities, including emergency assistance or "mutual aid" arrangements.

In some regions of the country, state regulators or RTOs/ISOs have established "demand side management programs" to assist utilities in managing the supply/demand balance that is essential to delivering reliable electric energy (which is not currently storable in commercial quantities). Therefore, some NFP Electric Entities engage in joint demand-side management programs with their retail electric customers whereby the customers agree to reduce service/load requirements during certain weather or emergency conditions. NFP Electric Entities may agree with each other to engage in joint demand-side management programs to conserve their collective generation resources and reduce costs, and to comply with their collective obligations to RTOs/ISOs, regional balancing authorities and state or local regulators.

NFP Electric Entities may provide to each other services related to the generation, transmission and/or distribution facilities owned by each, or with respect to the maintenance (ongoing, outage or emergency) or dispatch of generation units. Especially when there is a weather event or other unexpected outage which interrupts electric service to an NFP Electric Entity's customers, other NFP Electric Entities (and other electric utilities) in the geographic area will provide goods

[22] See footnote 48 for information about unique affiliations among NFP Electric Entities.

and services on an immediate basis, often without the opportunity of negotiating pricing or payment terms until the electric service has been restored to retail electric customers. These agreements between NFP Electric Entities may involve operating each others' facilities, sharing equipment supplies and employees (*e.g.*, line crews) and interfacing on each others' behalf with suppliers/vendors, regulators and reliability authorities and customers. An example of an operations-related agreement between NFP Electric Entities is provided in **Exhibit 2 at p. 4.**

G. Environmental Rights, Allowances or Attributes

There are a wide variety of Federal, regional, state and local environmental rights, allowances or attributes required to operate a particular NFP Electric Entity's electric facilities or operations, or to fulfill a particular NFP Electric Entity's regulatory requirements. NFP Electric Entities may transact among themselves in environmental emissions allowances, offsets or credits (including carbon), renewable energy, distributed generation, clean energy or energy efficiency credits or attributes (which can be regional or state specific in nature, including "green tags," etc.). NFP Electric Entities in a particular geographic region, whose available allowances may be directly useable to fulfill the needs of another NFP Electric Entity in the same region will often directly transact with each other, rather than go to a non-NFP Electric Entity to negotiate a particular transaction. An example of a transaction involving emissions allowances executed between two NFP Electric Entities is provided in **Exhibit 2 at p. 6**.

H. Both NFP Electric Entities Are Executing an Electric Operations-Related Transaction "to Hedge or Mitigate Commercial Risks"

All of the foregoing categories of agreements, contracts and transactions between NFP Electric Entities are intrinsically related to the needs of both of the NFP Electric Entities "to hedge or mitigate commercial risks"[23] which arise from their respective electric facilities and ongoing electric operations and public service obligations. One of the two entities has an excess and the other has a need for the same good, service or "commodity," or the same agreement, contract, transaction or arrangement involving a "commodity," each to hedge or mitigate a reciprocal commercial risk arising from and intrinsically related to electric facilities and operations.

When two NFP Electric Entities enter into a bilateral Electric Operations-Related Transaction, each of the NFP Electric Entities involved has operators whose core competency is managing the particular entity's unique electric operations-related risks. Very few of such transactions between NFP Electric Entities are, by their terms, intended by the two parties to be "settled" by delivery of cash by one NFP Electric Entity to the other without performance of some electric operations-related obligation. Rather, at the time two NFP Electric Entities enter into an Electric Operations-Related Transaction, by its terms the transaction contemplates performance of an electric operations-related obligation by one party, in exchange for payment or reciprocal performance of an electric operations-related function by the other party.[24]

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[23] CEA Section 2(h)(7)(A)(ii).

[24] Although we have discussed with the Commission's staff the concepts of "physically-settled contracts," "financially-settled contracts" and "cash settled contracts," as those terms are used in the futures industry context, those terms are not easily translated into a commercial context, where NFP Electric Entities enter into bilateral contracts governed by state law or by FERC, PUCT or state public utility tariffs to buy and sell goods and services. However, Electric Operations-Related Transactions between NFP Electric Entities are nonetheless always intrinsically related to the electric facilities and operations, and/or the public service obligations, of each of the NFP Electric Entities involved.

I. Scope of the Transactions Covered by the Exemptive Order

The Applicants are requesting an exemption for ***all*** Electric Operations-Related Transactions (which by definition hedge commercial risks and are intrinsically related to electric facilities and operations) between NFP Electric Entities. The Applicants also acknowledge and agree, by definition, that Electric Operations-Related Transactions do not include agreements, contracts or transactions used to hedge or mitigate financial market risks, such as interest rate, credit, equity, or currency "commodity" risks. Nor does such defined term include agreements, contracts or transactions that are used to hedge or mitigate financial market or commercial risks involving metals, or agricultural commodities or crude oil or gasoline commodities of any grade not used as fuel for electric generation. The Applicants are requesting the exemptive order ***only*** to allow the NFP Electric Entities to hedge or mitigate ongoing commercial risks that arise from, and that are intrinsically related to, the unique electric facilities or operations owned or operated by each of the NFP Electric Entities or to their ongoing public service obligations.[25]

If the Commission decides not to grant the categorical exemption for all Electric Operations-Related Transactions (including categories that might be developed in the future and that meet the definition), the Applicants respectfully request that the Commission add an additional category of approved Electric Operations-Related Transactions, including all "trade options" referencing the good and services (or "commodities") described in the foregoing subsections IIIA through IIIG above. In addition, as the electric industry and applicable technologies develop, the NFP Electric Entities will continue to develop new ways in which they can work together to fulfill their common public service obligations in the most cost effective way for their constituents/members. If the Commission decides not to grant the categorical exemption, the Applications respectfully request that the Commission delegate to the Commission staff the authority to review promptly, and approve as eligible for the benefit of the exemptive order, new categories of Electric Operations-Related Transactions between NFP Electric Entities, and that the Commission direct the staff to establish a streamlined procedure whereby the NFP Electric Entities can secure such approval.[26]

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[25] If the Commission determines that new CEA Section 4(c)(6) requires or permits the Commission to place restrictions or limitations in the exemptive order on the categories of Electric Operations-Related Transactions between NFP Electric Entities (other than those limitations that the Applicants have acknowledged in the proposed definition itself), the Applicants respectfully request an explanation of the Commission's reasoning for such restrictions.

[26] If the Commission determines that an exemption is not required or necessary for any of the categories of Electric Operations-Related Transactions described above, *e.g.*, based on the Commission's determination that such transactions are not "swaps," are "commercial merchandising arrangements," are "trade options," or are not agreements, contracts or transactions involving a "commodity," the Applicants respectfully request that the Commission issue specific statutory interpretation(s) to such effect in the exemptive order. The vast majority by number of NFP Electric Entities are small, not-for-profit electric utilities, formed and operated for the public service purpose of providing affordable electric service to their constituents. We respectfully request that the Commission not expect these small entities to become experts on the CEA, the Commission's rules and associated adopting releases, and precedent and statutory interpretations thereunder (which are not otherwise relevant to the NFP Electric Entities' ongoing electric operations) in order to continue engaging in Electric Operations-Related Transactions with other NFP Electric Entities.

The Applicants respectfully request that the Commission grant a categorical exemption from the requirements of the CEA for all "Electric Operations-Related Transactions" between NFP Electric Entities.

IV. NFP ELECTRIC ENTITIES

In Section 4(c)(6)(C) of the CEA, which was added to the CEA by Section 722(f) of the Dodd-Frank Act, Congress clearly stated its direction that the Commission "shall exempt" transactions executed between certain types of entities from the requirements of the CEA, by direct reference to FPA 201(f).[27] For the reasons explained below, the Applicants recommend that the Commission adopt the following definition of "NFP Electric Entities" for purposes of the requested exemptive order:

> NFP Electric Entity means (i) the United States, a State or any political subdivision of a State, or (ii) an "electric cooperative" that receives financing under the Rural Electrification Act of 1936 (7 U.S.C. 901 et seq.) or that sells less than 4,000,000 megawatt hours of electricity per year, or [(iii) any other electric cooperative, whether or not such electric cooperative meets the requirements of clause (ii) above,][28] or (iv) any agency, authority, instrumentality or department of any one or more of the foregoing, or a federally-recognized Indian tribe, or (v) any entity which is wholly owned, directly or indirectly, by any one or more of the foregoing. For purposes of this definition, an "electric cooperative" shall mean an "electric membership corporation" or an "electric power association" organized under State law, a "rural electric cooperative," "cooperative providing electric services to consumers and farmers" or any similar entity referenced in other Federal, State and local laws and regulations, so long as any such entity is formed and continues to operate for the primary purpose of providing electric service to its members on a not-for-profit, cooperative basis, and is treated as a cooperative under the Federal tax law.[29]

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27 Pub. L. No. 111-203, 124 Stat. 1376 (2010), Section 722. Regulatory clarity is enhanced when a regulation does not incorporate by reference another statute or regulation, making ongoing interpretation of the policy intent dependent on the continuing applicability of the cross-referenced statute or regulation. Therefore, the Applicants are requesting the Commission to grant the exemptive order for the benefit of existing and future NFP Electric Entities, by category of entity rather than by cross-reference to the FPA.

28 For the rationale for clause (iii) of the definition, see **Section IVB**.

29 For convenience, the definition of NFP Electric Entity is marked to show changes from FPA 201(f): ~~No provision in this subpart shall apply to, or be deemed to include,~~ NFP Electric Entity means (i) the United States, a State or any political subdivision of a State, or (ii) an "electric cooperative" that receives financing under the Rural Electrification Act of 1936 (7 U.S.C. 901 et seq.) or that sells less than 4,000,000 megawatt hours of electricity per year, or (iii) any other electric cooperative, whether or not such electric cooperative meets the requirements of clause (ii) above, or (iv) any agency, authority, ~~or~~ instrumentality or department of any one or more of the foregoing, or a federally-recognized Indian tribe, or (v) any ~~corporation~~ entity which is wholly owned, directly or indirectly, by any one or more of the foregoing~~, or any officer, agent, employee of any of the foregoing acting as such in the course of his official duty, unless such provision makes specific reference thereto~~. For purposes of this definition, an "electric cooperative" shall mean an "electric membership corporation" or an "electric power association" organized under State law, a "rural electric cooperative," "cooperative providing electric services to consumers and farmers" or any similar entity referenced in other Federal, State and local laws and regulations, so long as any such entity is formed and continues to operate for the primary purpose of providing electric service to its members on a not-for-profit, cooperative basis, and is treated as a cooperative under the Federal tax law.

The Applicants respectfully request that the exemptive order be issued:

> 1. For the benefit of all existing and future NFP Electric Entities, as defined in clauses (i) through (v) above ***or,*** if the Commission declines to extend the benefit of the exemptive order to non-FPA 201(f) electric cooperatives as requested under **Section IVB** below, alternatively
>
> 2. For the benefit of existing and future NFP Electric Entities, with such restrictions or additional requirements on non-FPA 201(f) electric cooperatives included in clause (iii) above as the Commission may determine are necessary.[30]

The Applicants respectfully request that, if the Commission declines to extend the benefit of the exemptive order to non-FPA 201(f) electric cooperatives (with or without restrictions or additional requirements), the Commission set forth its reasoning as to why non-FPA 201(f) electric cooperatives are not "appropriate persons" to have the benefit of the exemption. In such case, the Applicants respectfully request that the Commission grant the exemptive order for the benefit of NFP Electric Entities as if clause (iii) were deleted in its entirety, without prejudice to later or supplemental Application(s) for exemptive relief on behalf of non-FPA 201(f) electric cooperatives.

A. Section 201(f) of the Federal Power Act

The Federal Power Act (the "FPA") provides for regulation of the generation of electric energy in certain respects, transmission of electric energy in interstate commerce and the sale of electric energy at wholesale in interstate commerce by "public utilities," as well as regulation of the relationships between "public utilities" and their affiliates, and the governance of "public utilities" as entities, among other topics.[31] Section 201(b) provides that Part II of the FPA applies to the transmission of electric energy in interstate commerce and to the sale of electric energy at wholesale in interstate commerce "…[and] all facilities for such transmission or sale of electric energy … ."[32] Section 201(e) defines a "public utility" as "any person who owns or operates facilities subject to the jurisdiction of the Commission [FERC]…"

Section 201(f) of the FPA provides that certain types of entities enjoy a blanket exemption from plenary FERC jurisdiction under the FPA. Specifically, FPA 201(f) provides that:

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[30] For example, the Commission might consider a requirement that non-FPA 201(f) electric cooperatives meet the financial thresholds required by CEA Section 4(c)(3)(F), or enter into transactions that are FERC, ERCOT or state tariffed transactions under such tariffs even for those Electric Operations-Related Transactions with NFP Electric Entities, to meet other criteria for "appropriate persons" in accordance with CEA Section 4(c)(2), to have the benefit of the exemptive order under CEA Section 4(c)(6).

[31] Part I of the FPA, 16 U.S.C. §§ 792 et seq. deals with the establishment and functioning of FERC and the regulation of hydroelectric resources. Part III of the FPA, 16 U.S.C. §§ 825 et seq. deals with recordkeeping and reporting requirements and FERC's procedural rules concerning complaints, investigations and hearings.

[32] For the full text of FPA Section 201, see **Exhibit 1**.

> No provision in this subpart [Part II of the FPA] shall apply to, or be deemed to include, the United States, a State or any political subdivision of a State, an electric cooperative that receives financing under the Rural Electrification Act of 1936 (7 U.S.C. 901 et seq.) or that sells less than 4,000,000 megawatt hours of electricity per year, or any agency, authority, or instrumentality of any one or more of the foregoing, or any corporation which is wholly owned, directly or indirectly, by any one or more of the foregoing, or any officer, agent, employee of any of the foregoing acting as such in the course of his official duty, unless such provision makes specific reference thereto.[33]

Accordingly, an entity described in FPA 201(f) is not a "public utility" for purposes of Part II of the FPA. As such, FPA 201(f) entities do not need authorization from FERC under FPA Section 203 to sell, merge or consolidate their electric facilities, or to purchase, acquire, or take any security of any other public utility.[34] Nor do FPA 201(f) entities need approval under FPA Sections 205 and 206[35] which concern rates and charges to be collected by a public utility in transmitting or selling electric energy in interstate commerce.

As the last phrase of FPA 201(f) makes clear, an FPA 201(f) entity is exempt from the provisions of Part II of the FPA "unless such provision [in the FPA] makes specific reference thereto." Therefore, although an FPA 201(f) entity may be exempt from most areas of FERC jurisdiction, it nevertheless may be subject to certain provisions of the FPA.[36] For example, certain sales of electric energy by entities described in FPA 201(f) are subject to FERC's refund authority,[37] and entities described in FPA 201(f) must comply with applicable reliability standards under FPA Section 215(b)(1),[38] and, in some circumstances, Sections 210, 211 and 211A of the

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33 16 U.S.C. 824(f), titled "United States, State, political subdivision of a State, or agency or instrumentality thereof exempt." The term "subpart" refers to "Subpart II, Regulation of Electric Utility Companies Engaged in Interstate Commerce," commonly referred to as Part II of the FPA.

34 See, *18 CFR Parts 2 and 33 Transactions Subject to FPA Section 203*, 113 FERC ¶ 61,315 at 62,270 (2005).

35 *Promoting Wholesale Competition Through Open Access Non-discriminatory Transmission Services by Public Utilities, Recovery of Stranded Costs by Public Utilities and Transmitting Utilities*, 78 FERC ¶ 61,220 at note 531 (1997).

36 See, *e.g., North American Electric Reliability Corp.*, 129 FERC ¶ 61,033 at P 35, *reh'g denied*, 130 FERC ¶ 61,002 (2010) (The "EPAct 2005 amended Section 201(b)(2) to make clear that the Commission's jurisdiction over otherwise exempt public utilities under certain substantive provisions of the FPA…is only for the narrow purposes of implementing and enforcing those provisions.").

37 Where an entity described in FPA 201(f) voluntarily makes a short-term sale of electric energy through an "organized market," excluding electric cooperatives and entities and their affiliates (combined) selling less than 8 million MWh per year, such sales are subject to FERC's refund authority. EPAct 2005, Section 1286, amending Section 206 of the FPA (16 USC § 824e).

38 § 824o(b)(1). The legislative history states that one of the purposes of Section 215 was to prevent cascading blackouts, and that excluding entities described in FPA 201(f) from the reliability provision would run counter to this legislative purpose, thus creating significant gaps in the "otherwise comprehensive program to apply mandatory Reliability Standards to better assure the reliability of the Bulk-Power System." See, *North American Electric Reliability Corp.*, 129 FERC P 61,033 at P 37, *reh'g denied*, 130 FERC ¶ 61,002 (2010).

FPA.[39] FPA 201(f) entities are also subject to Section 222 of the FPA, which prohibits market manipulation:

> It shall be unlawful for any entity (including an entity described in Section 201(f)), directly or indirectly, to use or employ, in connection with the purchase or sale of electric energy or the purchase or sale of transmission services subject to the jurisdiction of the Commission, any manipulative or deceptive device or contrivance (as those terms are used in Section 10(b) of the Securities Exchange Act of 1934 (15 U.S.C. 78j(b)), in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of electric ratepayers.

16 U.S.C. § 824v.[40] Under FERC's market manipulation authority, the focus is both on the transaction and the entity's conduct. Importantly, for an FPA 201(f) entity to be subject to the Section 222 market manipulation authority of FERC, the act or inaction in question must be in connection with a jurisdictional transaction.[41]

Two important cases in the mid-1960s analyze the policy reasons for regulation of the electric industry overall, and for treating FPA 201(f) entities differently than other electric entities that are "public utilities" comprehensively regulated under Part II of the Federal Power Act. In *Dairyland Power Cooperative et al, v. Federal Power Commission*, 37 F.P.C. 12 (1967), the Federal Power Commission (the predecessor to FERC, the "FPC") analyzed the legislative purpose and the legislative history of both the Public Utility Act of 1935, of which the Federal Power Act was Title II (the "1935 Act") and the Rural Electrification Act of 1936 (the "REA"). In its discussion of the 1935 Act, the FPC explained that "the purpose of that legislation was most clear: it was designed to prevent the notorious investment and profit abuses which had developed in the industry under the domination of the holding companies. This is evident on nearly every page of the legislative history. The entire focus of this legislation was directed to the *privately-owned companies which held themselves out to render a public service*." 37 F.P.C at 15 (emphasis added).

In *Salt River Project Agricultural Improvement and Power District v. Federal Power Commission*, 391 F. 2d 470 (D.C. Circ 1968), the Court of Appeals for the DC Circuit endorsed the *Dairyland* policy rationale for FPA 201(f) in distinguishing entities by type of ownership, and exempting

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[39] Section 210 (16 U.S.C. § 824(i) deals with interconnection of electric facilities; Section 211 (16 U.S.C. § 824(j) deals with FERC's limited jurisdiction over "transmitting utilities," a term that includes certain entities described in FPA 201(f), for purpose of provision of certain transmission services, and 211A (16 U.S.C. §824(j-1) deals with transmission service. Also, FERC has recently proposed requiring entities described in FPA 201(f) to be subject to limited reporting requirements concerning the availability and prices of wholesale electric energy. In the Energy Policy Act of 2005, Pub. L. No. 109-58 § 1291(c), 119 Stat. 594, 984-85 (August 8, 2005) (EPAct 2005), Congress added Section 220 to the FPA (16 U.S.C. 824t) directing FERC to "facilitate price transparency in markets for the sale and transmission of electric energy in interstate commerce" with "due regard for the public interest, the integrity of those markets, fair competition, and the protection of consumers." See, *Electricity Market Transparency Provisions of Section 220 of the Federal Power Act*, 135 FERC ¶ 61,053 at PP 21-23 (Notice of Proposed Rulemaking) (2011) (collection of information from "any market participant" interpreted to include entities described in FPA 201(f)).

[40] This provision was added by Section 1283 of the EPAct 2005.

[41] *18 CFR PART 1c Prohibition of Energy Market Manipulation*, 114 FERC ¶ 61,047 at P 23 (2006).

entities that are not owned by profit-seeking investors from the otherwise comprehensive scope of the FPC's regulatory jurisdiction over the "public utilities" in the Federal Power Act. D.C. Circuit Court Judge J. Skelly Wright describes the legislative purpose behind the Federal Power Act as "to remedy rampant *abuses in the investor-owned electric utility industry*." Then Judge Wright points out that, in stark contrast, "…of the 19 major abuses summarized, virtually none could be associated with the [electric] cooperative structure where ownership and control is vested in the consumer-owners." 371 F.2d at 475.

In *Dairyland*, the FPC concluded that REA-financed electric cooperatives were intended by Congress to be FPA 201(f) entities and exempt from the FPC's jurisdiction over "public utilities." 37 F.P.C. at 27. The FPC made such a determination in the 1960s notwithstanding the fact that, at that time, electric cooperatives were not expressly described in FPA 201(f).[42] In *Dairyland*, the FPC noted that, when FPA 201(f) was initially included in the legislation that became the 1935 Act, the legislation explicitly exempted only government electric utilities. Concurrently, the same 74th Congress was debating the Rural Electrification Act of 1936, authorizing government funding of electric cooperatives under the REA to extend the benefits of electric service to rural areas in America. Based on its review of the contemporaneous legislative history of the two Acts, the FPC determined in the *Dairyland* decision that "[w]e think that this exemption includes the [electric] cooperative[s]… The cooperative movement was well known to Congress at the time the Federal Power Act was being considered, and the Congress gave extended attention to it." In its analysis, the FPC noted that it was just after a Congressional colloquy about the importance of the REA program "that Section 201(f) which, as originally proposed, made no mention of *instrumentalities*, was amended specifically to incorporate this term within the exemption." 37 F.P.C. at 17 (*emphasis added*).

In the 1968 *Salt River* case, the Court of Appeals for the DC Circuit affirmed the FPC's broad reading of FPA 201(f) to include REA-financed electric cooperatives, and pointed out that

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[42] As part of the Energy Policy Act of 2005 ("EPAct 2005"), Congress codified the previous interpretation by FERC (affirmed by the D.C. Circuit Court) that electric cooperatives that receive financing under the REA should be considered FPA 201(f) entities. At the same time, Congress also expanded the FPA 201(f) exemption by extending it to electric cooperatives that sell less than 4 million megawatt hours per year, even if those electric cooperatives have no REA financing. See, Pub. L. 109-58, 1291, 119 Stat. 594, 985 (2005), amending FPA 201(f) "by striking ''political subdivision of a state,'' and inserting ''political subdivision of a State, an electric cooperative that receives financing under the Rural Electrification Act of 1936 (7 U.S.C. 901 et seq.) or that sells less than 4,000,000 megawatt hours of electricity per year.'' The 4 million megawatt hours per year threshold is used by FERC and other regulators in a number of contexts to identify entities that are "small utilities," "small entities" or "small businesses," entitled to protection from the costs and regulatory burdens imposed on larger entities. *See* the discussion of the large number of NFP Electric Entities that are small entities in **Section VI** and the comment letters filed by the NFP Electric Entities in other Commission dockets, including the comment letter referenced in footnote 75. In EPAct 2005, Congress made the policy choice to exempt from FERC's plenary regulation these "small entity" electric cooperatives. Congress did not make a policy decision that the electric cooperatives selling 4 million megawatt hours or more per year required regulation under FPA 201(f) and, where EPAct 2005 did give FERC additional discretionary jurisdiction over electric cooperatives, FERC has not chosen to exercise that discretionary authority to date. When FERC exercises its jurisdiction, in certain instances FERC allows non-FPA 201(f) electric cooperatives additional regulatory flexibility, subject to "self-regulation" by such cooperatives' member/owner boards, distinguishing the not-for-profit electric sector from investor-owned electric utilities. As described in the text at **Section IVB**, the very small number of electric cooperatives that do not meet the 4 million megawatts per year threshold at any point in time are, nonetheless, "self-regulating entities," share the same cooperative governance structure, operate on a cooperative basis and are not-for-profit entities.

"…statutes, as the Supreme Court has said, are 'instruments of government,' not 'exercises in literary composition,' *United States v. Shirey*, 359 U.S. 255, 260, 79 S.Ct. 746, 3 L.Ed.2d 789 (1959), and 'departure from a literal reading of statutory language may…be…necessary in order to effect the legislative purpose.' *Malat v. Riddell*, 383 U.S. 569, 571-572, 86 S.Ct. 1030, 1032, 16 L.Ed.2d 102 (1966). In reviewing and affirming the FPC's determination not to regulate electric cooperatives as "public utilities," the D.C. Circuit Court approved the FPC's focus on the legislative purpose behind the Federal Power Act and the Rural Electrification Act, enacted by the same Congress in nearly contemporaneous legislation in the mid-1930s. The DC Circuit Court in *Salt River* endorsed the FPC's determination that FPA 201(f) entities in general, and REA-financed electric cooperatives in particular, were simply not part of the investor-owned electric industry that the Federal Power Act was enacted to reform.[43]

In confirming the FPC's decision to treat electric cooperatives as FPA 201(f) entities, Judge Wright in *Salt River* focused first on the Department of Agriculture's regulatory oversight of REA-financed electric cooperatives. But the court went on to explain that electric cooperatives are easily distinguishable from investor-owned electric utilities "…by their structural nature [. T]he cooperatives are ***effectively self-regulating***. They are completely owned and controlled by their consumer-members and only consumers can become members. They are non-profit [citation omitted]. Each member has a single vote in the affairs of the cooperative, and services is essentially limited to members. No officer receives a salary for his services and officers and directors are prohibited from engaging in any transactions with the cooperative from which they can earn any profit." 371 F.2d 473.

1. Types of Entities "Described in FPA 201(f)."

Entities described in FPA 201(f) include Federal electric utilities, including BPA and other Federal agencies that operate electric generating or transmission facilities,[44] and state-chartered electric utilities such as the New York Power Authority. Entities described in FPA 201(f) also

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[43] In *Dairyland*, the FPC concluded in the alternative that, even if the REA-financed cooperatives were "public utilities" under the FPA, they were exempt from FPC jurisdiction as instrumentalities of the government under FPA 201(f). In *Salt River*, the D.C. Circuit affirmed that alternative exemption rationale as well. See 371 F. 2d at 476.

[44] There are nine Federal electric utilities in the United States, which are part of several agencies of the United States Government (see, http://205.254.135.24/cneaf/electricity/page/prim2/toc2.html):

- the Army Corps of Engineers;
- the Bureau of Indian Affairs and the Bureau of Reclamation in the Department of the Interior,
- the International Boundary and Water Commission in the Department of State,
- the Power Marketing Administrations in the Department of Energy (BPA, Western Area Power Administration, Southwestern Area Power Administration, and Southeastern Area Power Administration), and
- the Tennessee Valley Authority (TVA).

In addition, three Federal agencies operate electric generating facilities:

- TVA, the largest Federal power producer;
- the U.S. Army Corps of Engineers; and
- the U.S. Bureau of Reclamation.

include state or county utility boards or public utility districts formed under state or local law, joint action agencies or joint power agencies formed under state law to provide wholesale power supply and transmission service to member entities (each a "Joint Action Agency"), and other political subdivisions of a state.[45] Entities described in FPA 201(f) also include municipal utilities ranging in size from LPPC members such as the Los Angeles Department of Water and Power and the Sacramento Municipal Utility District to the smallest municipal electric utilities with fewer than 500 electric meters.[46]

FERC has determined that federally-recognized Indian tribes that own or operate electric facilities which would otherwise subject such Indian tribes to regulation as "public utilities" under the FPA will be treated as entities described in FPA 201(f). See *City of Paris, KY vs. Federal Power Commission*, 399 F.2d 983 (DC Cir. 1968); *Sovereign Power Inc.*, 84 FERC ¶ 61,014 (1998); *Confederated Tribes of the Warm Springs Reservation of Oregon, a Federally Recognized Indian Tribe, and Warm Springs Power Enterprises, a Chartered Enterprise of the Confederated Tribes of the Warm Springs Reservation of Oregon,* 93 FERC ¶ 61,182 at 61,599 (2000) (concluding that "the Tribes are an instrumentality of the 'United States, a State or any political subdivision of a state'" and that Warm Springs Power Enterprises, a Chartered Enterprise of the Tribes, was entitled to Tribes' Section 201(f) exemption.). The Secretary of the Interior periodically lists in the Federal Register Indian tribes that are recognized by the United States government pursuant to Section 104 of the Act of November 2, 1994, Pub. L. No. 103-454, 108 Stat. 4791, 4792, as codified at 25 U.S.C. § 479a-1.

FERC's determination that such Indian tribes are FPA 201(f) entities was based on the fact that, in operating such electric facilities, the Indian tribes perform government functions; the funds generated by such electric operations would be used for governmental purposes and would decrease the need for federal funding, and that the Indian tribes are subject to Interior Department oversight. In addition, like the other government or government-owned electric entities described in FPA 201(f), the Indian tribes are tax exempt or "not-for-profit" entities.

"Entities described in FPA 201(f)" also include certain electric cooperatives. Unlike government-owned electric entities, an electric cooperative must meet certain additional specified criteria to fall within FPA 201(f): (RUS)it must either borrow from the United States Department of Agriculture's Rural Utilities Service ("RUS") or it must sell less than 4,000,000 megawatt hours of electricity per year or it must meet the requirements for an "aggregated FPA 201(f) entity" described in the next paragraph. There are typically two types of electric cooperatives (i) distribution cooperatives, which distribute electric service directly to their owner/member electric customers, and (ii) G&T cooperatives which are owned by distribution cooperatives. G&T

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[45] A public power district or public utility district may be owned and operated by a city, county, state or regional agency. See, *e.g.*, Public Utility District No. 1 of Chelan County, Washington (http://www.chelanpud.org/your-PUD.html). An irrigation district is a utility organized under state law which generates electricity in the course of supplying water. For example, Imperial Irrigation District in California was formed in 1911 under the California Irrigation District Act, as described at http://www.iid.com/index.aspx?page=39. Government-owned utilities are accountable to elected and/or appointed officials and, ultimately, the American public. The focus of a government-owned electric utility is to provide reliable and safe electricity service, keeping costs low and predictable for its customers, while practicing good environmental stewardship.

[46] A government owned or operated electric utility may be a department of the governmental entity, or may be organized as a separate agency, authority or instrumentality thereof (see clause (iv) of the definition of "NFP Electric Entity."

cooperatives generate or purchase, and transmit, electricity, and provide it to their constituent distribution cooperatives for delivery to the distribution cooperatives' owner/members.[47]

Finally, FPA 201(f) describes both individual electric entities and the entities formed by or comprised of these same not-for-profit government-owned and cooperatively-owned electric entities. *See* clause (v) in the definition of NFP Electric Entity and the identical language in FPA 201(f). The most prevalent type of affiliation among these entities, and aggregated entity "described in FPA 201(f)," is a G&T cooperative formed by its constituent distribution cooperative (NFP Electric Entity) members or, comparably, a Joint Action Agency which is formed by its constituent government-owned (NFP Electric Entity) utility members.

Entities described in clause (v) of the definition of NFP Electric Entity are owned or operated by entities otherwise described in FPA 201(f). In many cases, such an aggregated entity may be formed by its constituent NFP Electric Entities to more cost-effectively fulfill their collective public service mission. Or an aggregated NFP Electric Entity may also be formed by other NFP Electric Entities to provide operations-related risk management, agency or other operations-related services to its members and other NFP Electric Entities on a collective basis.

NFP Electric Entities sometimes band together to build, buy, own or operate large-scale electric generation or transmission facilities to service their customers. In connection with such a project, a project entity may be formed, or the project may operate as a joint venture under a contract among NFP Electric Entities.[48] These aggregated NFP Electric Entities may generate, transmit and sell electric energy to just to their constituent NFP Electric Entities, to all NFP Electric Entities, or to third parties as well. Other aggregated NFP Electric Entities may purchase natural gas or electric energy (from affiliated NFP Electric Entities, from other NFP Electric Entities, or from third parties), and use the natural gas as fuel for generation. Still other aggregated NFP Electric Entities perform all or a combination of these electric operations-related functions both for themselves and for other NFP Electric Entities. Their public service mission (and the missions of the NFP Electric Entities that formed them) is the singular purpose and reason for their existence. The complex Federal, state and local system of laws and regulations within which each of these entities operates is designed specifically to support this collective public service mission.

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[47] NRECA's members include approximately 66 G&T cooperatives, which generate and/or purchase and/or transmit electricity, and provide it to 668 of the 846 distribution cooperatives that are NRECA members.Some electric cooperatives are primarily distribution cooperatives, but may own intrastate transmission facilities or small generation facilities such as diesel-fueled generators or wind or solar generators, which may be operated by the distribution cooperative itself or by the affiliated G&T cooperative as part of a "full requirements" contract with the distribution cooperative. See **Section III** for more information about the types of transactions between electric cooperatives and other NFP Electric Entities.

[48] For a more complete explanation of the unique affiliations between NFP Electric Entities, see the comment letter filed in the Commission's "Entity Definitions" proceeding, 75 Fed. Reg. 80,174 (Dec. 21, 2010) available at http://comments.cftc.gov/PublicComments/ViewComment.aspx?id=27917&SearchText=rural.

2. Shared Public Service Mission and Common Governance Model

The exemption provided for in CEA Section 4(c)(6)(C) is, by clear statutory language, entity-based. The shared characteristics of such entities were the fundamental reason for Congress' direction that the Commission grant an exemption from the requirements of the CEA for all transactions between such NFP Electric Entities (as an entity category), subject only to the "public interest" determinations set forth in the statute. The purpose and mission of these not-for-profit electric entities has been for well over 75 years, and still is today, to provide reliable electric energy to retail electric customers every hour of the day and every season of the year, keeping costs low and supply predictable, while practicing cost-effective environmental stewardship.

NFP Electric Entities are created under law or juridical documents as tax exempt, nonprofit or not-for-profit entities for the primary purpose of providing electric utility services,[49] with direct involvement and oversight by elected or appointed government officials or cooperative members/consumers in both the management of the electric facilities and the operations of the entity. As Judge Wright said in *Salt River*, these entities are "effectively self-regulating." 371 F.2d. 473.

The electric facilities and operations of government-owned NFP Electric Entities are managed by government employees with oversight by elected officials and/or citizen governing boards. The government-owned entities have no shareholders or outside investors to profit from the entity's Electric Operations-Related Transactions. All activities relating to electric facilities and operations are conservatively managed to accomplish the not-for-profit public service mission. Management of such electric operations is a core competency of the staff of the NFP Electric Entity, and is monitored by agency or elected officials responsible directly to the public. All revenues accruing from operational (or "commercial") risk management activities related to the electric facilities and operations are used to reduce the cost of government services to the retail electric customers/citizens.

An electric cooperative is both owned and controlled by the electric consumer/members to whom or to which it provides electric service, with no shareholders or outside investors to profit from the electric cooperative's Electric Operations-Related Transactions. The electric facilities and operations of an electric cooperative are managed by employees with experience in such operations, with a focus on fulfilling the NFP Electric Entity's public service mission. All activities in respect of electric facilities and operations are conservatively managed to accomplish the not-for-profit public service mission. Management of such electric operations is a core competency of the staff of the NFP Electric Entity and is monitored by the cooperative's board, which is elected by and comprised of its members/customers. All revenues from operational (or "commercial") risk management activities related to the electric facilities and operations are used to reduce the cost of electric service delivered to the electric consumer/members of the electric cooperative.

[49] Government or government-owned entities may provide electric utility services as one of many government services to their constituents. Electric cooperatives may provide their members with telephone, internet or other services on a cooperative basis, in addition to providing electric service.

B. Non-FPA 201(f) Electric Cooperatives are "Appropriate Persons" to be Included in the Definition of "NFP Electric Entities" for Purposes of this Exemptive Order

Section 4(c)(6) was added to the CEA by the Dodd-Frank Act, concurrently with the new authority given to the Commission to regulate "swaps" and the persons and entities who enter into "swaps." By including Section 4(c)(6) and, in particular, Section 4(c)(6)(C), in the Dodd-Frank Act, Congress expressed its clear intent that the Commission exempt transactions in the United States electric and natural gas industries and, in particular, transactions between "entities described in FPA 201(f)" from the requirements of the CEA, upon making certain limited determinations. In the statute itself, Congress effectively makes the determination for the Commission that "entities described in FPA 201(f)" are "appropriate persons" entitled to the benefits of the exemptive order.

In CEA Section 4(c)(6), Congress also gives the Commission the ancillary authority to grant exemptions "in accordance with paragraphs (1) and (2) [of CEA Section 4(c)]." The Applicants respectfully request the Commission to determine that an additional category of entities are "appropriate persons" and should have the benefit of the requested CEA Section 4(c)(6) exemptive order in accordance with CEA Sections 4(c)(1) and 4(c)(2) – non-FPA 201(f) electric cooperatives.

CEA Section 4(c)(1) permits the Commission to exempt transactions or classes of transactions, and to exempt a person or class of persons entering into such transactions, "either unconditionally or on stated terms or conditions or for stated periods and either retroactively or prospectively. CEA Section 4(c)(2) then goes on to require that such a Section 4(c)(1) exemption only be granted so long as the Commission makes the determination under CEA Section 4(c)(2)(B)(i) that such persons are "appropriate persons" to enter into the transactions covered by the requested exemptive order.

Section 4(c)(3) defines "appropriate person" for purposes of Section 4(c)(2)(B)(i) by reference to the qualifications or characteristics of the person or class of persons being considered, and by reference to the transaction or types of transactions for which the exemptive order is sought.[50] Typically, the Commission has looked at the financial strength and sophistication of the persons being permitted to engage in transactions that are to be exempted from the requirements of the CEA. As provided in Section 4(c)(3)(K), the Commission may also consider the operations management qualifications of the person or class of persons in relation to the exempted transactions, as well as the person's (or class of persons') ability to execute the exempted transactions without additional regulatory protection by the Commission. Section 4(c)(3)(K) provides that an "appropriate person" may include "[s]uch other persons that the Commission determines to be appropriate in light of their financial *or* other qualifications, *or* the applicability of appropriate regulatory protections (emphasis added)."[51]

In order for an electric cooperative to be one of the "entities described in FPA 201(f)," such electric cooperative must receive financing under the Rural Electrification Act of 1936 (7 U.S.C. 901 et seq.) from the Rural Utilities Service (the "RUS") ***or*** it must sell less than 4,000,000

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50 See, *4(c) Exemption Order,* referenced in footnote 11 above, at 33,206-33,207.

51 7 U.S.C. 6(c)(3)(K).

megawatt hours of electricity per year ***or*** the electric cooperative may be an "aggregated NFP Electric Entity," directly or indirectly wholly-owned by NFP Electric Entities.

RUS is a Federal government program which was originally established to finance electric cooperative infrastructure investments under the Rural Electrification Act. RUS was, and remains, the primary government-owned financing vehicle for electric cooperatives' infrastructure projects and ongoing working capital. However, RUS relies on annual Congressional appropriations for its available funds. In some years, appropriations from Congress have not been, or may not be, available to fully fund the expected needs for electric cooperatives' funding. In other circumstances, RUS financing may not be the most appropriate or least expensive financing for certain electric cooperative needs.

RUS is no longer the only available financing source for electric cooperatives. In addition to RUS, electric cooperatives today may borrow from the National Rural Utilities Cooperative Finance Corporation or from Co-Bank.[52] These cooperative lenders were established to provide additional resources to finance electric cooperative infrastructure projects and to provide other important types of working capital (such as lines of credit or letters of credit) that RUS does not provide. Electric cooperatives may also borrow from private lenders, or they may not borrow at all, but instead decide to fund infrastructure investments and operations from ongoing revenues and reserves. There is no implication under FPA 201(f) that such "non-FPA 201(f) electric cooperatives" are more or less creditworthy or financially sound, or more or less deserving of electric operational deference or regulatory preference, than electric cooperatives that do borrow from the RUS.

Historically, very few electric cooperatives sold 4,000,000 megawatt hours or more in a particular year. That is still true today. However, the success of the electric cooperative model means that there may be a small number of electric cooperatives in any particular year whose annual sales exceed the threshold.[53] It should also be noted that an electric cooperative's annual megawatt sales will ***always*** fluctuate year-by-year depending on customer and usage trends, economic conditions and weather in its geographic area, among other factors. Therefore, in one year, an electric cooperative may fall below the annual sales threshold and the next year exceed it, fall below and then again exceed the threshold for the FPA 201(f) "sales of megawatt hours per year" requirement. As with the RUS financing criteria, there is no implication under FPA 201(f) that such "non FPA 201(f) electric cooperatives" are more or less creditworthy or financially sound, or more or less deserving of operational deference or

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[52] The National Rural Utilities Cooperative Finance Corporation ("CFC") is a nonprofit cooperative entity formed in 1969 by NRECA's electric cooperative members. CFC provides access to financing to supplement the loan programs of the RUS. CFC is the largest non-governmental lender to America's rural electric systems, and nearly 200 electric cooperatives across the United States rely solely on CFC for financing. CFC has separately requested exemptive relief from the Commission for the swaps it enters into related to providing financing to its members electric cooperatives. CoBank is a cooperative bank owned by electric cooperatives and agricultural cooperatives, and is a part of the Farm Credit Administration system.

[53] According to data collected by NRECA, fewer than 1% of distribution cooperatives exceed the 4 million MWh annual sales threshold, as do approximately 24 of 66 G&T cooperatives.

regulatory preference, than electric cooperatives that year after year remain below the FPA 201(f) threshold.[54]

An electric cooperative that has made the business decision to borrow from an available lender other than RUS, or that has sold **more** than the threshold number of megawatt hours in a particular year, is arguably at least as financially sound and operationally qualified as the electric cooperatives "described in FPA 201(f)." Non-FPA 201(f) electric cooperatives also likely own and operate more or larger generation and transmission assets, and would therefore meet the financial criteria established in CEA Section 4(c)(3) for an "appropriate person" by having a net worth exceeding $1,000,000 or total assets exceeding $5,000,000.[55]

A very small number of electric cooperatives fall outside the requirements set forth in FPA 201(f) at any particular point in time.[56] All these electric cooperatives have the same not-for-profit public service mission, the same "effectively self-regulating" cooperative characteristics described in the *Salt River* case, and the same (or more) operational qualifications to execute Electric Operations-Related Transactions with other NFP Electric Entities.

Most electric cooperatives are organized under a specific electric cooperative or similar state law; some are organized under a state's general cooperative or corporation act. If the state law of organization does not require operation on a cooperative basis, then these electric cooperatives require operation "on a cooperative basis" through their articles of incorporation and bylaws. While the state laws and governance documents referenced above all require operation on a cooperative basis, there are some minor differences depending on the state of organization. For state law purposes, there are no material differences between electric cooperatives described in FPA 201(f) and non-FPA 201(f) electric cooperatives.

All electric cooperatives are treated as "cooperatives" under Federal tax law. *See* 26 U.S.C. §§ 501(c)(12), 1381(a)(2)(C). Both electric cooperatives described in FPA 201(f) and non-FPA 201(f) electric cooperatives are required to operate on a cooperative basis.. As explained by the United States Tax Court in the seminal case of *Puget Sound Plywood, Inc. v. Commissioner of Internal Revenue*, 44 T.C. 305 (1965), operating on a cooperative basis means operating according to the cooperative principles of:

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54 The larger electric cooperatives in terms of megawatts sold, or those electric cooperatives that have made a strategic business decision not to borrow from RUS, may have on file FERC, PUCT or various state tariff(s) that govern these entities' electric energy sales, natural gas sales or other Electric Operations-Related Transactions with other NFP Electric Entities. However, not all categories of Electric Operations-Related Transactions between non-FPA 201(f) electric cooperatives and other NFP Electric Entities are subject to such tariffs. .

55 See CEA Section 4(c)(3)(F).

56 In recent proceedings, FERC estimated that there were approximately 15 electric cooperatives (of more than 900) which do not meet the requirements set forth in FPA 201(f). *Statement of Cynthia A. Marlette, General Counsel of FERC, before the Committee on Agriculture, Subcommittee on Conservation, Credit, Energy, and Research, United States House of Representatives* (July 30, 2008) (available at http://www.ferc.gov/eventcalendar/Files/20080730104611-Marlette.pdf). NRECA believes that, of its current members, the following are non-FPA 201(f) electric cooperatives: Pacific Northwest Generating Cooperative (PNGC Power), Golden Spread Electric Cooperative, Old Dominion Electric Cooperative, Wabash Valley Power Association, Wolverine Power Cooperative, and Deseret Power Electric Cooperative.

- Democratic member control;
- Operation at cost; and
- Subordination of capital.

As further explained by the Tax Court in *Puget Sound Plywood*, "[c]ooperatives may be divided roughly into consumer cooperatives and producer cooperatives." 44 T.C. at 306. Consumer cooperatives operate for the "benefit of the members in their capacity as individual consumers." Producer cooperatives operate for the "benefit of the members in their capacity as producers." They market or process goods produced individually or collectively by their members.

An electric cooperative is a consumer cooperative. As explained by the Internal Revenue Service in Internal Revenue Manual §4.76.20.4 (2006), and based upon *Puget Sound Plywood*, and other cases and rulings, when applied to electric cooperatives, and with emphasis supplied:

- Democratic member control "assures that ***members participating in the cooperative's endeavors remain in control*** of [the cooperative]. A cooperative satisfies this requirement by periodically holding democratically conducted meetings with members, ***each with one vote***, electing officers [or directors] to operate the organization."

- Operation at cost "requires a cooperative to return excess operating revenues to its member-patrons. This means the cooperative ***must not operate either for profit or below cost***. … [a cooperative] must allocate [its excess operating revenue] to its members ***in proportion to the amount of business it did with each***."

- Subordination of capital "requires that those who contribute capital to the cooperative neither control the operations nor receive most the pecuniary benefits of its operations. This principle ***distinguishes a cooperative from a for-profit corporation***, which is shareholder-oriented. The theory behind this requirement is that members band together to share their interest, risk, and burden to obtain services or benefits rather than invest as equity owners. Subordination of capital has two components: … [m]embers control and own the savings or monetary benefits from the [cooperative] that stay with them ***rather than going to shareholders or equity investors*** [and the] cooperative must limit its return on capital to ***ensure savings or monetary benefit go its members rather than shareholders***."

The above cooperative principles apply to each electric cooperative treated as a "cooperative" under Federal tax law, regardless of whether the electric cooperative is "described in FPA 201(f)" or a non-FPA 201(f) electric cooperative.

The overwhelming majority of electric cooperatives are exempt from Federal income taxation. An exempt electric cooperative must annually collect "85 percent or more of [its] income … from members for the sole purpose of meeting losses and expenses." 26 U.S.C. § 501(c)(12)(A). The electric cooperative must collect this income from members for services described in its exemption. In general, a "member" is an individual or entity that purchases goods or services from the electric cooperative, is entitled to participate in the electric cooperative's management, and is a person with or for whom the electric cooperative does business on a cooperative basis. *See* Internal Revenue Manual §§ 4.76.20.4(8), 4.76.20.6 (2006). The member income requirement applies to each electric cooperative exempt from Federal income taxation, regardless of whether the electric cooperative is "described in FPA 201(f)" or a non-FPA 201(f) electric cooperative.

An electric cooperative lacks incentive or motivation to manipulate prices, disrupt market integrity, engage in fraudulent or abusive sales practices, or misuse customer assets because it: (1) is a consumer cooperative; (2) is controlled by its members; (3) must operate at cost and "not operate either for profit or below cost;" (4) may not benefit its individual members financially; and (5) if exempt from Federal income taxation, must collect at least 85 percent of its income from members. This is true regardless of whether the electric cooperative is described in FPA 201(f) or a non-FPA 201(f) electric cooperative.

In many other Federal and state laws, all electric cooperatives (whether or not described in FPA 201(f)) are treated the same when the provision identifies a category of entities to be considered as distinct from electric utilities that are "investor-owned" (or shareholder-owned) and operated on a for-profit basis. For example, whether or not electric cooperatives meet the criteria described in FPA 201(f), all electric cooperatives are (or may be) entitled to Rural Utilities Service loan preferences under the Rural Electrification Act of 1936 (7 U.S.C. § 904), are entitled to Federal power administration power and energy sale preferences (*see, e.g.,* 16 U.S.C. § 825s), are excluded from Federal pole attachment regulation under the Communications Act of 1934 (47 U.S.C. § 224(a)(1)), and excluded from many state utility commission regulations.

For all these reasons, regulation of Electric Operations-Related Transactions between electric cooperatives (regardless of whether the electric cooperative is "described in FPA 201(f)" or a non-FPA 201(f) electric cooperative), or between electric cooperatives and other FPA 201(f) entities, is not necessary to promote responsible economic or financial innovation and fair competition. The Commission should exempt Electric Operations-Related Transactions between electric cooperatives and other FPA 201(f) entities, regardless of whether the electric cooperative is "described in FPA 201(f)" or a non-FPA 201(f) electric cooperative. *See* 7 U.S.C. §§ 5, 6.

The Applicants respectfully request that the Commission find, in accordance with CEA Sections 4(c)(1), 4(c)(2)(B) and 4(c)(3)(K), that non-FPA 201(f) electric cooperatives are "appropriate persons" to be included within the category "NFP Electric Entities" for purposes of executing Electric Operations-Related Transactions with FPA 201(f) entities and with other non-FPA 201(f) electric cooperatives under the terms of this CEA Section 4(c)(6) exemptive order.[57] For the foregoing reasons, the Applicants respectfully request that the Commission define an "NFP Electric Entity" as set forth at the beginning of this **Section IV**, and grant the exemptive order categorically to all present and future NFP Electric Entities.

[57] If the Commission declines to include non-FPA 201(f) electric cooperatives within the scope of the exemptive order, the Applicants respectfully request that the Commission acknowledge the following in the adopting release: if an electric cooperative that, as of the effective date of the exemptive order, does not meet the additional criteria required to be an entity "described in FPA 201(f)," thereafter restructures its operations, sells less than 4 million megawatt hours in any year, or borrows from RUS, such change in circumstances enabling the electric cooperative to have the benefit of the exemptive order would not be interpreted as evasion of Commission's jurisdiction.

C. Additional Requests

The Applicants respectfully request the Commission to order that, to the extent that an NFP Electric Entity offers or enters into an Electric Operations-Related Transaction with another NFP Electric Entity, such transaction be exempt from the requirements of the CEA retroactive to the enactment of the Dodd-Frank Act and prospectively, and not be considered or counted for any purpose which affects or may affect such NFP Electric Entity's regulatory status under the CEA, or the NFP Electric Entity's obligations under the CEA.[58]

The Applicants also respectfully request that, to the extent one NFP Electric Entity offers or renders advice, agency, analysis or other services to another NFP Electric Entity with respect to Electric Operations-Related Transactions between NFP Electric Entities in general, that such services in respect of such transactions will not be considered in determining such NFP Electric Entity's regulatory status under the CEA, or the NFP Electric Entity's obligations under the CEA.

V. THE NEW STATUTORY EXEMPTION AUTHORITY IN CEA SECTION 4(c)(6)

CEA Section 4(c)(6) provides that the Commission ***shall*** exempt certain categories of transactions from the requirements of the CEA, if the exemption is consistent with the public interest and the purposes of the CEA.[59] The exemption determination is to be conducted "in accordance with paragraphs (1) and (2) [of CEA Section 4(c)]."[60] However, nothing in the language of new CEA Section 4(c)(6) requires the Commission to exercise its new "public interest waiver authority" in exactly the same way in which the Commission has previously considered exemptions under CEA Section 4(c)(1) for transactions (or classes of transactions) or persons (or classes of persons) that would otherwise have been subject to CEA Section 4(a).

CEA Section 4(c)(6) does not "incorporate by reference" Section 4(c)(1) or 4(c)(2), and nothing in the language of the Dodd-Frank Act or the legislative history indicates a Congressional intent that the requirements of, and the exceptions to, Sections 4(c)(1) and/or 4(c)(2) should either override or limit the specific statutory exemption provided for in new CEA Section 4(c)(6).

CEA Section 4(c)(6) was added to the CEA by the Dodd-Frank Act concurrently with the Commission's new jurisdiction over "swaps" and the persons and entities that enter into "swaps." In the Dodd-Frank Act, the provision is called the "Public Interest Waiver [of CFTC

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58 In particular, the Applicants respectfully request that the Commission include in the exemptive order or in the statutory interpretation in the adopting release a statement that Exempt Electric Operations-Related Transactions between NFP Electric Entities would not contribute to, or be a factor in, the determination of whether an NFP Electric Entity is a "swap dealer," a "major swap participant," a "commodity trading advisor," or any other entity designation regulated by the Commisison, would be exempt from the rules on mandatory clearing, and would be exempt from all of the rules related to reporting of such Electric Operations-Related Transactions.

59 New CEA Section 4(c)(6) was part of Section 722 of the Dodd-Frank Act, which also included other provisions indicating Congress' intent to provide regulatory clarity for the electric industry, including provisions protecting the jurisdiction of the FERC and state energy regulatory commissions over agreements, contracts and transactions executed on a trading facility owned or operated by an RTO or an ISO, and other FERC jurisdiction under the Federal Power Act and the Natural Gas Act. See Sections 722(e) and 722(g) of the Dodd-Frank Act.

60 7 U.S.C. 6(c)6.

Jurisdiction]." The statutory exemption language in new CEA 4(c)(6) directs the Commission to grant broad categorical public interest waivers of the Commission's statutory jurisdiction under the CEAto certain types of transactions described therein, not merely to consider limited contract-by-contract, transaction-by-transaction or entity-by-entity exemptions.

CEA Section 4(c)(1) authorizes and permits the Commission in general to "promote responsible economic and financial innovation and fair competition" by exempting any transaction or class of transactions, and any person or class of persons engaging in those transactions, from provisions of the CEA (subject to exceptions not relevant to this exemption Application).[61] In accordance with Section 4(c)(1), the Commission can act by rule, regulation or order, on its own initiative or on application of any person. The definition of "person" in the CEA includes associations.

The language in new Section 4(c)(6) is different in a number of important respects from the language in CEA Sections 4(c)(1) and 4(c)(2), which were left unchanged in relevant respects by the Dodd-Frank Act. As distinguished from the "shall exempt" language of new Section 4(c)(6), Section 4(c)(1) provides, in general, that the Commission "may exempt" certain agreements, contracts and transactions, including certain persons or class of persons engaged in such transactions, from the Section 4(a) requirements to transact "contracts of sale [of a commodity] for future delivery" on a CFTC-regulated exchange.[62] Section 4(c)(1) provides that the Commission may exempt such transactions (and such persons) either unconditionally or on certain conditions, and subject to exceptions and restrictions.

CEA Section 4(c)(2) provides that, ***unless*** the Commission makes several specific determinations, the Commission shall not grant any exemption under 4(c)(1) from the requirements of CEA Section 4(a). CEA Section 4(c)(2) does ***not*** require such determinations to be made for exemptions of transactions or persons from the requirements of the CEA other than exemptions from the provisions of Section 4(a).[63] CEA Section 4(c)(2) consequently, by its terms, operates as limitation on the Commission's discretionary authority to grant exemptions under Section 4(c)(1).

The Commission's authority to impose conditions, limitations or restrictions on the scope of a Section 4(c)(1) exemption are not either repeated in new CEA Section 4(c)(6), nor are they

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61 *4(c) Exemption Order*, 72 Fed Reg. 33,205 at 33,206; 7 U.S.C. 6(c)(1).

62 Section 4(a) of the CEA provides, in general, that if a person offers or sells a futures contract, other than in compliance with Section 4(a), such transactions are unlawful.

63 "The Commission shall not grant any exemption under paragraph (1) ***from any of the requirements of subsection (a) (emphasis added)*** unless the Commission determines that—

(A) the requirement should not be applied to the agreement, contract, or transaction for which the exemption is sought and that the exemption would be consistent with the public interest and the purposes of this Act; and

(B) the agreement, contract, or transaction—

(i) will be entered into solely between appropriate persons; and

(ii) will not have a material adverse effect on the ability of the Commission or any contract market or derivatives transaction execution facility to discharge its regulatory or self-regulatory duties under this Act."

"incorporated by reference" from Section 4(c)(1). The Section 4(c)(2)'s limitations on the Commission's discretionary authority to grant Section 4(c)(1) exemptions are not duplicated or incorporated by reference as applicable to new Section 4(c)(6) public interest waiver requirements. Although Congress could have amended both 4(c)(1) and 4(c)(2) to make all the provisions and requirements, exceptions and conditions of CEA Section 4(c)(1) and 4(c)(2) specifically applicable to public interest waivers or exemptions authorized under new Section 4(c)(6), Congress chose not to do so.[64]

CEA Section 4(c)(2) lists three determinations the Commission must make in exercising its discretion as to whether to grant an exemption from Section 4(a) under Section 4(c)(1): the exemption should be consistent with the public interest and the purposes of the CEA, the exempted transactions should be entered into only by "appropriate persons," and the exempted transactions should not have a material adverse effect on the ability of the Commission (or Commission-regulated entities) to discharge regulatory (or self-regulatory) duties under the CEA.[65] Only the first of these three determinations is required by new CEA Section 4(c)(6), while the other two determinations are not required.

The Applicants seek an exemptive order under new CEA Section 4(c)(6), "in accordance with" the applicable provisions of 4(c)(1) and 4(c)(2). The Applicants do not seek an exemptive order under Section 4(c)(1). Therefore, the Commission is not required to make the other two determinations required by Section 4(c)(2) in order to grant the requested exemptive order under Section 4(c)(6). In fact, it would be wholly inconsistent with the plain statutory language of new CEA Section 4(c)(6) and the Dodd-Frank Act in providing for the "public interest waiver" exemption, if the Commission imposed inconsistent or additional requirements drawn from Sections 4(c)(1) or 4(c)(2) on Applicants for a 4(c)(6) exemptive order.

A. The Exemption of Electric Operations-Related Transactions between NFP Electric Entities is Consistent with the Public Interest

The "public interest" referenced in CEA Section 4(c)(6) is articulated in CEA Section 3(a): to provide a means for managing and assuming price risks, discovering prices, or disseminating pricing information through trading in liquid, fair and financial secure trading facilities.[66] The requested exemptive order is consistent with the "public interest". "Electric Operations-Related

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64 In the Dodd-Frank Act, Congress did add certain exception provisions to Section 4(c)(1). However, although the language is garbled, the exceptions are clearly **not** intended to be applied to exemptions specifically added to the CEA by the Dodd-Frank Act, where "the Commission is expressly authorized by any provision…to grant exemptions." The exceptions to Section 4(c)(1) are not applicable to Section 4(c)(6).

65 The Applicants do not seek an exemptive order under Section 4(c)(1) from the requirements of Section 4(a). The Applicants seek an exemption under new CEA Section 4(c)(6) for transactions between FPA 201(f) entities and, in accordance with 4(c)(1) and 4(c)(2), the Applicants request the Commission to allow additional "appropriate persons" to be considered NFP Electric Entities (non-FPA 201(f) electric cooperatives) and thereby to rely on the Section 4(c)(6) exemptive order, in accordance with CEA Section 4(c)(1) and 4(c)(2). Although the manner in which the Commission has previously considered Section 4(c)(1) exemptions from its pre-Dodd-Frank Act jurisdiction over futures contracts may be informative as to the manner in which the Commission is intended by Congress to consider exemptions under new CEA 4(c)(6), the Commission's prior Section 4(c)(1) procedure is not determinative, especially given the differences in statutory language in new Section 4(c)(6).

66 7 U.S.C. 5(a).

Transactions" entered into between NFP Electric Entities are not standardized derivatives, and are not and cannot be standardized into fungible trading "products." Such Electric Operations-Related Transactions are not executed between NFP Electric Entities on "registered entities," *i.e.*, designated contract markets, swap execution facilities or other multilateral electronic trading facilities. The transactions present no risk to the liquidity, fairness or financial security of any such trading facilities referenced in CEA Section 3(a)'s public interest provisions. The transactions are not market-facing transactions, but instead are entered into bilaterally between and among a "closed loop" of NFP Electric Entities with a not-for-profit shared public service mission.

NFP Electric Entities enter into Electric Operations-Related Transactions solely to "hedge or mitigate commercial risks"[67] arising from their operations. In the words of CEA Section 3(a), NFP Electric Entities manage price risk, they do not assume price risk. NFP Electric Entities currently have a choice to use either transactions executed bilaterally with other NFP Electric Entities or transactions with other counterparties or market participants.[68] Other market participants (non-NFP Electric Entities) may seek to manage or assume price risks, discover prices or disseminate pricing information in respect of standardized and tradable derivatives "agreements, contracts or transactions" involving nonfinancial commodities.

It is highly unlikely that any of these standardized derivatives trading contracts would contain the same customized economic terms of any particular Exempt Electric Operations-Related Transaction between two NFP Electric Entities. If market participants are seeking pricing information for products or instruments involving the same commodity, such market participants would look to standardized contracts or products traded on registered entities – futures, or exchange-traded options or "swaps." Market participants would not look at bilateral Electric Operations-Related Transactions between NFP Electric Entities to discover prices for traded, standardized products.

In addition to the "public interest" articulated in CEA Section 3(a), the exemptive order is consistent with the "public interest" as articulated in Section 201 of the Federal Power Act (of which, of course, FPA 201(f) is a part). The Federal Power Act became law in 1935, and Section 201(a) provides that

> It is hereby declared that the business of transmitting and selling electric energy for ultimate distribution to the public is affected with ***a public interest***, and that Federal regulation of matters relating to generation[,]…and of that part of such [electric] business which consists of the transmission of electric energy in interstate commerce and the sale of such energy at wholesale in interstate commerce is necessary in ***the public interest***, such Federal regulation, however, to extend only to those matters which are not subject to regulation by the States.[69]

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67 CEA Section 2(h)(7)(A)(ii).

68 NFP Electric Entities do not "assume" price risks in respect of Electric Operations-Related Transactions as contemplated by CEA Section 3(a). The NFP Electric Entity's exposure to commodity price risks (and to other commercial risks) arise from the electric operations in which the NFP Electric Entities engage to fulfill their public service mission.

69 16 U.S.C Section 824(a), see **Exhibit 1** for the full text.

Under Section 201(b)(1) of the FPA, FERC's jurisdiction is comprehensive:

> [T]he Commission [FERC] shall have jurisdiction over all facilities for…transmission [of electric energy in interstate commerce] or sale of electric energy [at wholesale in interstate commerce]…"[70]

In Section 722 of the Dodd-Frank Act, which amended the CEA to add the "Public Interest Waiver" provisions of Section 4(c)(6), including the direct reference to the Federal Power Act and FPA 201(f) in Section 4(c)(6)(C), Congress instructed the Commission on important matters related to the electric industry, and recognized the importance of FERC's comprehensive jurisdiction over the electric industry. It is reasonable to conclude that Congress intended the words "[consistent with] the public interest" in Section 4(c)(6) as a reference to those words as they appear in the Federal Power Act.

The requested exemptive order is clearly consistent with "the public interest" as articulated in the FPA, where Section 201 expresses FERC's comprehensive jurisdiction over electric facilities and operations, and then FPA 201(f) limits such "public interest" jurisdiction as necessary to effectively regulate without burdening the self-regulating entities that Congress intended to exclude from FERC's plenary jurisdiction. The Applicants respectfully request the Commission to determine that the requested exemptive order is "consistent with the public interest" as required by CEA Section 4(c)(6).

B. The Exemption of Electric Operations-Related Transactions Between NFP Electric Entities is Consistent with the Purposes of the CEA

The "purposes of the CEA" to be considered by the Commission in making its determination under Section 4(c)(6) are set forth in CEA Section 3(b): to provide a system of effective self-regulation of trading facilities, clearing systems, market participants and market professionals; to deter and prevent price manipulation or any other disruptions to market integrity; to ensure the financial integrity of all transactions subject to the Act and the avoidance of systemic risk; to protect all market participants from fraudulent or other abusive sales practices and misuse of customer assets; to promote innovation and fair competition among boards of trade, other markets and market participants.[71]

All of these purposes focus on the financial trading markets for standardized commodity-based derivatives products or instruments. None of these purposes focus on commercial transactions that may or may not involve a "commodity" (as that term is defined in the CEA) and that take place between nonfinancial entities buying and selling goods and services under bilateral contracts with customized terms in order "to hedge or mitigate commercial risks"[72] of such nonfinancial entities.

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70 16 U.S.C. Section 824(b)(1).

71 7 U.S.C. 5(b).

72 CEA Section 2(h)(7)(A)(ii).

The exemption of Electric Operations-Related Transactions that are entered into ***between*** NFP Electric Entities will have no effect on the ability of the Commission to achieve the purposes of the CEA. Electric Operations-Related Transactions are not standardized commodity derivatives products or instruments, are not executed, traded or cleared on a regulated entity, and do not involve financial market professionals or trading facilities regulated by the Commission.

New CEA Section 4(c)(6) must be implemented to effectuate Congressional intent in the context of a new Dodd-Frank Act regulatory regime for "swaps." Exemptions under Section 4(c)(6) must be considered by category for both transactions and for entities. The Commission should exempt such transactions from its jurisdiction, or "waive" the requirements of the CEA as it is directed to do in Section 4(c)(6), because such an exemptive order or waiver is "consistent with the public interest" as articulated in the CEA and in the FPA, and consistent with the purposes of the CEA. The requested exemptive order will ensure that the public interest in regulating these markets is met "in a manner so as to ensure effective and efficient regulation."[73]

C. The Exemption of Electric Operations-Related Transactions Between NFP Electric Entities is Consistent with the Purposes of the Dodd-Frank Act

When Congress amended the CEA to give the CFTC new jurisdiction over "swaps" and the entities which transact in "swaps," the Dodd-Frank Act expressed several additional objectives for this new jurisdiction: to reduce systemic risk to the United States financial system, to increase pre-trade and post-trade price transparency for standardized derivatives products for the benefit of market participants seeking price discovery, and to increase market transparency both for the Commission and for "prudential regulators" with jurisdiction over markets and market participants to allow more effective regulation and market oversight.

The Dodd-Frank Act adds an important caveat to the purposes of the CEA and the Commission's exercise of its new authority over "swaps" and entities that transact in "swaps:" clear Congressional intent and direction to preserve cost-effective access to risk management tools for nonfinancial entities that use such tools to hedge or mitigate commercial risks ("end users"). NFP Electric Entities are all nonfinancial end users of Electric Operations-Related Transactions, and enter into such transactions only to hedge or mitigate commercial risks.

The requested exemptive order is also consistent with the purposes of the Dodd-Frank Act. Electric Operations-Related Transactions between NFP Electric Entities do not present a risk to the United States financial system or to the financial security of registered entities. Such

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[73] See also Section 720 of the Dodd-Frank Act. Congress also instructed the Commission and FERC to enter into memoranda of understanding (the "FERC/CFTC MOUs"), to avoid ongoing regulatory uncertainty about electric industry transactions as the Commission implements its new jurisdiction with respect to "swaps." Specifically, in Section 720(a)(i), Congress directed the Commission to work with FERC to (1) "ensure effective and efficient regulation," (2) to "resolve conflicts concerning overlapping jurisdiction" and (3) to "avoid to the extent possible conflicting or duplicative regulation. The FERC/CFTC MOU was to have been filed with the appropriate Committees of Congress on or before January 17, 2011. The Commission's new jurisdictional relationship with existing energy regulators has serious implications for the NFP Electric Entities and for all those entities that participate in the United States electric industry. The electric industry is still waiting for clarity on how the two agencies will draw the jurisdictional lines, and how the Commission's new jurisdiction over "swaps" will affect the electric industry's mission to deliver electric energy to American consumers -- more than 18 months after the Dodd-Frank Act was enacted and more than a year after the due date for the FERC/CFTC MOU.

transactions do not involve interconnected financial institutions that may be "systemically important" or "too big to fail." Such transactions do not involve financial market professionals, financial intermediaries or registered entities regulated by the Commission. Such transactions do not involve "financial entities" (as that term is defined in new CEA Section 2(h)(7)(C)(i)) or entities that are subject to "prudential regulation." Such transactions involve counterparty risk only between NFP Electric Entities, which share the common not-for-profit public service mission and are focused on operational not financial, performance.

Electric Operations-Related Transactions between NFP Electric Entities are, by definition, intrinsically related to the NFP Electric Entities' electric facilities and operations and their not-for-profit public service obligations. These entities, and the transactions between these entities, are specifically identified within the Dodd-Frank Act itself as meriting a statutory exemption from the requirements of the CEA, so long as the Commission makes the required CEA Section 4(c)(6) determinations. In fact, adding regulatory burdens to such transactions is directly ***inconsistent*** with Congressional intent in the Dodd-Frank Act to preserve cost-effective access to commercial risk management tools for nonfinancial or "commercial" end users. If the exemptive order is not granted, the costs of such additional regulatory burdens on both of the NFP Electric Entities involved in each Electric Operations-Related Transaction will be passed through directly to their respective electric consumers. [74]

VI. THE EXEMPTIVE ORDER IS NARROWLY TAILORED AND SHOULD NOT BE CONDITIONED OR LIMITED

The defined term "NFP Electric Entity" is a limited and "closed loop" category of not-for-profit entities. There is no profit incentive for a financial entity or another market participant to form or invest in an NFP Electric Entity in order to avail itself of this narrowly crafted exemptive order or evade the Commission's jurisdiction. Government-owned electric utilities and electric cooperatives do not own or operate electric facilities or engage in Electric Operations-Related Transactions for profit-making purposes or to transact in the financial trading markets for commodities, futures, exchange-traded options or "swaps."

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[74] If the Applicants were seeking an exemption under CEA Section 4(c)(1) for transactions otherwise subject to Section 4(a), Section 4(c)(2) would require certain additional determinations to be made. There is no indication that such determinations are required for exemptions pursuant to new CEA Section 4(c)(6) "in accordance with [subparagraphs 4(c)](1) and (2)." If and to the extent the Commission determines that it is necessary to make the additional determinations required by CEA Section 4(c)(2), the Applicants respectfully submit the following:

> Given the nature of the Electric Operations-Related Transactions between NFP Electric Entities, the exempted transactions should have no effect on the ability of the Commission, any designated contract market or any self-regulatory organization to discharge its regulatory or self-regulatory duties under the CEA. The transactions subject to the exemption are customized transactions that are not executed, traded or cleared on a registered entity, and are not subject to regulation by a self-regulatory organization. Instead, the Electric Operations-Related Transactions are executed under the experienced supervision of the electric operations staff of the two NFP Electric Entities to hedge or mitigate their respective commercial risks. This limited category of transactions take place outside the scope of the Commission's jurisdiction, the designated contract markets and the self-regulatory organizations, as Congress intended when it directed the Commission to provide the public interest waivers/exemptions called for in new CEA Section 4(c)(6).

An NFP Electric Entity's electric facilities and operations are used to fulfill the shared public service mission. If a for-profit entity were to form a government-owned electric utility or an "electric cooperative" as defined herein, the assumed obligations to provide electric service to constituent members (the primary purpose for which the entity exists) and the limited scope of the exemptive order would not allow the entity to profit from its Electric Operations-Related Transactions or to evade the Commission's jurisdiction. The beneficiaries of the exemptive order are a "closed loop" of entities, and the circumscribed set of exempted transactions are narrowly-tailored to achieve the specific Congressional intent of new CEA Section 4(c)(6) and, in particular, CEA Section 4(c)(6)(C).[75]

Electric Operations-Related Transactions between NFP Electric Entities are not "market-facing" transactions – in many instances, the pricing of such transactions does not directly correlate to pricing of standardized market instruments or products involving these "commodities" and transacted either anonymously on a registered entity or bilaterally with non-NFP Electric Entities. In each instance, the transaction between two NFP Electric Entities will reflect a risk-weighting and risk-pricing for these transactions between NFP Electric Entities that may be different from that which would take place where one party or the other might have a profit motive for the transaction, or the counterparty is unknown.

These are not standardized transactions and the transactions are not executed, traded or cleared on a multilateral electronic trading facility or a central clearing system that removes counterparty risk. In some instances, an RTO or ISO may provide a transmission or distribution delivery interface for the two NFP Electric Entities or otherwise provide the mechanism by which delivery or settlement is accomplished. However, this exemptive order is restricted to bilateral Electric Operations-Related Transactions ***between*** two NFP Electric Entities.[76]

These transactions are exclusively "nonfinancial entity-to-nonfinancial entity" and "commercial end-user-to-commercial end-user." Neither party is an entity that will be otherwise registered with or regulated as an entity by the Commission or subject to the jurisdiction of prudential regulators in respect of these Electric Operations-Related Transactions. These are electric facilities management and operations-related transactions, with customized geographic and operational terms. Neither entity has investors or shareholders to profit from trading, speculating or dealing in such agreements, contracts or transactions, as distinguished from using these transactions "to hedge or mitigate commercial risks."[77] These transactions are

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75 For market-facing bilateral agreements, contracts or transactions to which NFP Electric Entities are just one of the two counterparties (whether "swaps," nonfinancial commodity forward transactions, commercial merchandising arrangements involving nonfinancial commodities, commodity "trade options," or other commercial transactions) and whether or not subject to regulatory tariffs, the Applicants and others in the electric industry await clear rules from the Commission further defining "swap," along with the CFTC/FERC jurisdictional Memoranda of Understanding called for by Section 720 of the Dodd-Frank Act, the "tariffed transaction exemption(s)" called for in CEA Sections 4(c)(6)(A) and 4(c)(6)(B), and other final rules, interpretations and exemptions. See the comment letter filed by the Electric Trade Associations in the "Product Definitions" or "Definition of 'Swap'" docket at: http://comments.cftc.gov/PublicComments/ViewComment.aspx?id=47934&SearchText=Wasson.

76 The Applicants understand that the Commission is discussing with each of the RTOs and ISOs a possible exemption from the provisions of the CEA for transactions executed or traded on an electronic trading facility owned or operated by an RTO or an ISO and entered into pursuant to a tariff or rate schedule approved or permitted to take effect by FERC.

77 CEA Section 2(h)(7)(A)(ii).

simply not the types of standardized commodity derivative transactions that the Dodd-Frank Act intended the Commission to regulate.

As noted in the Applicants' comment letters in the Commission's various rulemaking dockets implementing the Dodd-Frank Act, the vast majority by number of the NFP Electric Entities meet the definition of "small entity" under the Regulatory Flexibility Act, 5 U.S.C. §§ 601-612, as amended Mar. 29, 1996 by the Small Business Regulatory Enforcement Fairness Act) ("SBREFA").[78] The Regulatory Flexibility Act incorporates by reference the definition of "small entity" adopted by the Small Business Administration (the "SBA"). The SBA's small business size regulations state that an entity which provides electric services is a "small entity" if its total electric output for the preceding fiscal year did not exceed four million megawatt hours.[79]

If the exemptive order is not granted, the Applicants must respectfully request a full SBREFA cost-benefit analysis of that decision. If the exemptive order is not categorical in nature, either with respect to transactions or entities, the Applicants respectfully request a SBREFA cost-benefit analysis of that decision in light of the clear language of CEA Section 4(c)(6) and, in particular, Section 4(c)(6)(C). If the Commission imposes any of the CEA's regulatory requirements on NFP Electric Entities in respect of Electric Operations-Related Transactions between NFP Electric Entities, the Applicants respectfully request a SBREFA cost-benefit analysis of that decision. The burdens imposed on "small entities" by applying requirements of the CEA to Electric Operations-Related Transactions between NFP Electric Entities would be substantial and, as the "small entities" in most instances, the NFP Electric Entities have very little prior experience with or expertise in respect of the CEA or the Commission's jurisdiction, and no staff or systems to research, interpret, apply or implement any such requirements.[80] In contrast, the Applicants must respectfully submit that there would be no measurable incremental regulatory benefit in terms of financial market integrity or pre-trade or post-trade market transparency for standardized commodity derivatives if the Commission requires these NFP Electric Entities to understand and comply with its rules for Electric Operations-Related Transactions entered into between NFP Electric Entities.

The Applicants respectfully request that the Commission <u>not</u> require regulatory recordkeeping or reporting of these Electric Operations-Related Transactions between NFP Electric Entities. As discussed above, such reporting would not serve either a pre-transaction or a post-transaction

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78 13 C.F.R. §121.201, n.1.

79 *See* the comment letter cited in footnote 75 above.

80 The Applicants are unable to provide to the Commission any cost estimates for any or all NFP Electric Entities to comply with any or all of the requirements of the CEA for Electric Operations-Related Transactions between NFP Electric Entities, especially without certainty as to whether or which of the Electric Operations-Related Transactions fall within the scope of the Commission's new CEA jurisdiction as "swaps." However, given the nature of the NFP Electric Entities and the nature of the Electric-Operations related transactions as the Application describes, and having reviewed the Commission's CEA Section 15(a) considerations: protection of market participants and the public, efficiency, competitiveness or financial integrity of futures markets, price discovery for standardized derivatives products, sound risk management practices and other public interest considerations, we do not believe there is any incremental regulatory benefit from applying any of the requirements of the CEA to the Electric Operations-Related Transactions for which the exemption is sought. All incremental regulatory costs attributable to CEA compliance for Electric Operations-Related Transactions will be passed through by the NFP Electric Entities directly to electric consumers.

market transparency goal. If the pricing of these "non-market facing" transactions were included in aggregated and publicly disseminated market pricing information for purposes of "pricing transparency," the inclusion of such transactions could result in distorted aggregated market pricing information being disseminated to the public, due to anomalous "between NFP Electric Entity" prices.

Post-transaction reporting or disclosure of the terms of these transactions could in some cases disclose NFP Electric Entities' commercially-sensitive information, which could then be used to the detriment of these not-for-profit entities by other market participants. The geography-specific nature of these transactions, intrinsically related as they are to the electric facilities owned by an NFP Electric Entity or to delivery of electricity to retail electric consumers of an NFP Electric Entity, means that the transactions take place at very "illiquid delivery points" with few market participants. It would be virtually impossible for the Commission to allow disclosure of such transaction information while protecting the identity of the two counterparties and their business transactions and market positions as required by new CEA Section 2(a)(13)(c).

Each individual NFP Electric Entity keeps records of its operations and its Electric Operations-Related Transactions as such entity is required to comply with applicable Federal, state and local laws and regulations, applicable government or cooperative accounting principles, and the specific governance documents applicable to such entity. As described above, there is a wide range of size and regulatory characteristics within the NFP Electric Entity category. NFP Electric Entities' records of these transactions are simply not kept in a uniform manner among NFP Electric Entities. For the vast majority of NFP Electric Entities by number (the smaller members of the category), the records will not be maintained in a format consistent with financial markets recordkeeping or reporting, and there will be no consistent, or even minimum, records retention period. These entities are simply not the type of financial market participants that the Dodd-Frank Act meant to have recordkeeping and reporting obligations to the Commission in respect of these particular Electric Operations-Related Transactions.

VII. THE EXEMPTIVE ORDER SHOULD BE GRANTED PROMPTLY TO REDUCE THE CONTINUING AND UNNECESSARY REGULATORY UNCERTAINTY FOR NFP ELECTRIC ENTITIES

The Commission should not delay granting the requested exemptive order for further rulemakings implementing the Dodd-Frank Act. Congress was clear in CEA Section 4(c)(6)(C) that it intended the Commission to consider a categorical exemption for transactions between entities described in FPA 201(f) that might otherwise be deemed subject to the CEA. The Applicants respectfully request that the Commission inform the Applicants promptly as to when publication of the proposed exemptive order in the Federal Register will occur (and that such publication date be not later than June 15, 2012), and the Applicants respectfully request that the exemptive order be issued no later than 30 days after publication in the Federal Register.[81] The Applicants do not request confidential treatment of this Application and respectfully request that the Application be posted in an easily accessible location on the Commission's website.

[81] The Applicants have provided copies of this Application to each Commissioner's office, to the Commission Secretary, and to the Office of the Commission's General Counsel. The Applicants have also made copies available to each of the trade association Applicants' members, to the Federal power agencies and to other interested parties.

VIII. CONCLUSION

The Applicants respectfully request an order exempting Electric Operations-Related Transactions executed between NFP Electric Entities from the requirements of the CEA, as amended by the Dodd-Frank Act, and for the other ancillary relief requested herein. The text of the requested Exemptive Order is provided in Exhibit 3.

SIGNATURE PAGE –EXEMPTION APPLICATION – SECTION 4(c)(6)

Please contact any of the individuals below or Patricia Dondanville, Reed Smith LLP, 10 South Wacker Drive, 40th Floor, Chicago Illinois 60606, telephone (312) 207-3911, or e-mail pdondanville@reedsmith.com, if you have questions regarding this Application.

Respectfully submitted,

NATIONAL RURAL ELECTRIC COOPERATIVE ASSOCIATION

Russ Wasson

Russell Wasson
Director, Tax Finance and Accounting Policy
4301 Wilson Blvd., EP11-253
Arlington, VA 22203
Tel: (703) 907-5802
E-mail: russell.wasson@nreca.coop

AMERICAN PUBLIC POWER ASSOCIATION

Susan N. Kelly
Senior Vice President of Policy Analysis and General Counsel
1875 Connecticut Avenue, N.W.
Suite 1200
Washington, D.C. 20009-5715
Tel: (202) 467-2933
E-mail: skelly@publicpower.org

LARGE PUBLIC POWER COUNCIL

Noreen Roche-Carter
Chair, Tax and Finance Task Force
c/o Sacramento Municipal Utility District
6201 S Street
Sacramento, CA 95817-1899
Tel: (916) 732-6509
E-mail: nrochec@smud.org

BONNEVILLE POWER ADMINISTRATION

Virginia K. Schaeffer
Attorney
Bonneville Power Administration
Office of the General Counsel – LC-7
P.O. Box 3621
Portland, Oregon 98208-3621
Tel: (503)230-4030
Email: vkschaeffer@bpa.gov

TRANSMISSION ACCESS POLICY STUDY GROUP

John Twitty, Executive Director
Transmission Access Policy Study Group
4203 E. Woodland St.
Springfield, MO 65809
Tel: (417) 838-8576
Email: 835consulting@gmail.com

cc: Honorable Gary Gensler, Chairman
Honorable Mark Wetjen, Commissioner
Honorable Jill E. Sommers, Commissioner
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Honorable Scott O'Malia, Commissioner
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Director, Tax Finance and Accounting Policy
4301 Wilson Blvd., EP11-253
Arlington, VA 22203
Tel: (703) 907-5802
E-mail: russell.wasson@nreca.coop

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Suite 1200
Washington, D.C. 20009-5715
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LARGE PUBLIC POWER COUNCIL

Noreen Roche-Carter
Chair, Tax and Finance Task Force
c/o Sacramento Municipal Utility District
6201 S Street
Sacramento, CA 95817-1899
Tel: (916) 732-6509
E-mail: nrochec@smud.org

BONNEVILLE POWER ADMINISTRATION

Virginia K. Schaeffer
Attorney
Bonneville Power Administration
Office of the General Counsel – LC-7
P.O. Box 3621
Portland, Oregon 98208-3621
Tel: (503)230-4030
Email: vkschaeffer@bpa.gov

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Springfield, MO 65809
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NATIONAL RURAL ELECTRIC COOPERATIVE ASSOCIATION

Russell Wasson
Director, Tax Finance and Accounting Policy
4301 Wilson Blvd., EP11-253
Arlington, VA 22203
Tel: (703) 907-5802
E-mail: russell.wasson@nreca.coop

AMERICAN PUBLIC POWER ASSOCIATION

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Senior Vice President of Policy Analysis and General Counsel
1875 Connecticut Avenue, N.W.
Suite 1200
Washington, D.C. 20009-5715
Tel: (202) 467-2933
E-mail: skelly@publicpower.org

LARGE PUBLIC POWER COUNCIL

Noreen Roche-Carter
Chair, Tax and Finance Task Force
c/o Sacramento Municipal Utility District
6201 S Street
Sacramento, CA 95817-1899
Tel: (916) 732-6509
E-mail: nrochec@smud.org

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Tel: (703) 907-5802
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NATIONAL RURAL ELECTRIC COOPERATIVE ASSOCIATION

Russell Wasson
Director, Tax Finance and Accounting Policy
4301 Wilson Blvd., EP11-253
Arlington, VA 22203
Tel: (703) 907-5802
E-mail: russell.wasson@nreca.coop

AMERICAN PUBLIC POWER ASSOCIATION

Susan N. Kelly
Senior Vice President of Policy Analysis and General Counsel
1875 Connecticut Avenue, N.W.
Suite 1200
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Office of the General Counsel – LC-7
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Portland, Oregon 98208-3621
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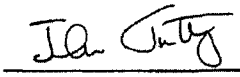
Email: vkschaeffer@bpa.gov

TRANSMISSION ACCESS POLICY STUDY GROUP



John Twitty, Executive Director
Transmission Access Policy Study Group
4203 E. Woodland St.
Springfield, MO 65809
Tel: (417) 838-8576
Email: 835consulting@gmail.com

cc: Honorable Gary Gensler, Chairman
Honorable Mark Wetjen, Commissioner
Honorable Jill E. Sommers, Commissioner
Honorable Bart Chilton, Commissioner
Honorable Scott O'Malia, Commissioner
Office of the CFTC General Counsel

EXHIBIT 1

United States Code Annotated
Title 16. Conservation
Chapter 12. Federal Regulation and Development of Power
Subchapter II. Regulation of Electric Utility Companies Engaged in Interstate Commerce

§ 824. Declaration of policy; application of subchapter

(a) Federal regulation of transmission and sale of electric energy

It is declared that the business of transmitting and selling electric energy for ultimate distribution to the public is affected with a public interest, and that Federal regulation of matters relating to generation to the extent provided in this subchapter and subchapter III of this chapter and of that part of such business which consists of the transmission of electric energy in interstate commerce and the sale of such energy at wholesale in interstate commerce is necessary in the public interest, such Federal regulation, however, to extend only to those matters which are not subject to regulation by the States.

(b) Use or sale of electric energy in interstate commerce

(1) The provisions of this subchapter shall apply to the transmission of electric energy in interstate commerce and to the sale of electric energy at wholesale in interstate commerce, but except as provided in paragraph (2) shall not apply to any other sale of electric energy or deprive a State or State commission of its lawful authority now exercised over the exportation of hydroelectric energy which is transmitted across a State line. The Commission shall have jurisdiction over all facilities for such transmission or sale of electric energy, but shall not have jurisdiction, except as specifically provided in this subchapter and subchapter III of this chapter, over facilities used for the generation of electric energy or over facilities used in local distribution or only for the transmission of electric energy in intrastate commerce, or over facilities for the transmission of electric energy consumed wholly by the transmitter.

(2) Notwithstanding subSection (f) of this Section, the provisions of Sections 824b(a)(2), 824e(e), 824i, 824j, 824j-1, 824k, 824*o*, 824p, 824q, 824r, 824s, 824t, 824u, and 824v of this title shall apply to the entities described in such provisions, and such entities shall be subject to the jurisdiction of the Commission for purposes of carrying out such provisions and for purposes of applying the enforcement authorities of this chapter with respect to such provisions. Compliance with any order or rule of the Commission under the provisions of Section 824b(a)(2), 824e(e), 824i, 824j, 824j-1, 824k, 824*o*, 824p, 824q, 824r, 824s, 824t, 824u, or 824v of this title, shall not make an electric utility or other entity subject to the jurisdiction of the Commission for any purposes other than the purposes specified in the preceding sentence.

(c) Electric energy in interstate commerce

For the purpose of this subchapter, electric energy shall be held to be transmitted in interstate commerce if transmitted from a State and consumed at any point outside thereof; but only insofar as such transmission takes place within the United States.

(d) “Sale of electric energy at wholesale” defined

The term “sale of electric energy at wholesale” when used in this subchapter, means a sale of electric energy to any person for resale.

(e) “Public utility” defined

The term “public utility” when used in this subchapter and subchapter III of this chapter means any person who owns or operates facilities subject to the jurisdiction of the Commission under this subchapter (other than facilities subject to such jurisdiction solely by reason of Section 824e(e), 824e(f) [FN1], 824i, 824j, 824j-1, 824k, 824*o*, 824p, 824q, 824r, 824s, 824t, 824u, or 824v of this title).

(f) United States, State, political subdivision of a State, or agency or instrumentality thereof exempt

No provision in this subchapter shall apply to, or be deemed to include, the United States, a State or any political subdivision of a State, an electric cooperative that receives financing under the Rural Electrification Act of 1936 (7 U.S.C. 901 et seq.) or that sells less than 4,000,000 megawatt hours of electricity per year, or any agency, authority, or instrumentality of any one or more of the foregoing, or any corporation which is wholly owned, directly or indirectly, by any one or more of the foregoing, or any officer, agent, or employee of any of the foregoing acting as such in the course of his official duty, unless such provision makes specific reference thereto.

(g) Books and records

(1) Upon written order of a State commission, a State commission may examine the books, accounts, memoranda, contracts, and records of--

(A) an electric utility company subject to its regulatory authority under State law,

(B) any exempt wholesale generator selling energy at wholesale to such electric utility, and

(C) any electric utility company, or holding company thereof, which is an associate company or affiliate of an exempt wholesale generator which sells electric energy to an electric utility company referred to in subparagraph (A),

wherever located, if such examination is required for the effective discharge of the State

commission's regulatory responsibilities affecting the provision of electric service.

(2) Where a State commission issues an order pursuant to paragraph (1), the State commission shall not publicly disclose trade secrets or sensitive commercial information.

(3) Any United States district court located in the State in which the State commission referred to in paragraph (1) is located shall have jurisdiction to enforce compliance with this subSection.

(4) Nothing in this Section shall--

(A) preempt applicable State law concerning the provision of records and other information; or

(B) in any way limit rights to obtain records and other information under Federal law, contracts, or otherwise.

(5) As used in this subSection the terms “affiliate”, “associate company”, “electric utility company”, “holding company”, “subsidiary company”, and “exempt wholesale generator” shall have the same meaning as when used in the Public Utility Holding Company Act of 2005 [42 U.S.C.A. § 16451 et seq.].

CREDIT(S)

(June 10, 1920, c. 285, § 201, as added Aug. 26, 1935, c. 687, Title II, § 213, 49 Stat. 847; amended Nov. 9, 1978, Pub.L. 95-617, Title II, § 204(b), 92 Stat. 3140; Oct. 24, 1992, Pub.L. 102-486, Title VII, § 714, 106 Stat. 2911; Aug. 8, 2005, Pub.L. 109-58, Title XII, §§ 1277(b)(1), 1291(c), 1295(a), 119 Stat. 978, 985.)

[FN1] So in original. Section 824e of this title does not contain a subsec. (f).

EXHIBIT 2

Examples of the Transaction Types described in Section III
Exemption Application under Section 4(c)(6) of the Commodity Exchange Act

A. "Full Requirements" or "All Requirements" Agreement

Example 1- Cost-Based Pricing between an NFP Electric Entity and its Member/Constituent

Generation and transmission cooperative A was formed and exists primarily to supply the "full-requirement" electric services needs of its 8 member-owner distribution cooperatives in the Southwest region of the U.S. A sells to member-owner distribution cooperative B, firm electric service sufficient to supply the needs of B's retail electric customers, or "load." The term of this existing exclusive supply arrangement is 24 years. The pricing of the arrangement requires B to pay A's fluctuating cost-based rate for generating, transmitting and/or purchasing the power supply and delivering it to B's customers. The rate that A charges B (and charges the 7 other member-owners of A) is set by A's board of directors on a periodic basis. Each member-owner of A (including B) is represented on A's board of directors by one of its own directors (e.g., each director of A is also a director of one of A's constituent distribution cooperatives, and each is therefore an individual member/electric customer of such distribution cooperative). B's peak load is estimated at 45 MWs for 2012, and on average over the past five years B has experienced a 2% load growth. B has an economic development initiative to attract new commercial and industrial electric customers into its service territory. Based on the geographic region in which A and B are located (which is not within the "footprint" of an RTO), the terms of the full requirements arrangement means that A will be responsible for either generating or purchasing electric energy and related commodities (e.g., fuel, emissions allowances, etc.), state required capacity and generation reserves, firm transmission service, transmission tariff ancillary services, line losses, energy scheduling and servicing B's distribution substations.

Example 2 -- Market-Based Pricing between Exempt Electric Utilities (not "Affiliated" Constituents[82])

Generation and transmission cooperative C sells electric energy to municipal utility D on a firm electric service basis for a term of two years as the exclusive supply to meet D's retail electric load. D is located in the geographic region that falls within the PJM RTO. C is responsible for providing firm electric service for 100% of D's retail electric load, regardless of changes arising from residential, industrial or commercial customer load

[82] Note that the affiliation structures within and among the NFP Electric Entity group are not analogous to corporate parent/subsidiary structures, where a 10% or even a 50% common ownership may be presumed a control relationship. Nor are such structures analogous to financial entity/account relationships. The government-owned electric entities and electric cooperatives are "affiliated" in a manner unique to their respective not-for-profit electric industry groups. See footnote 48.

growth, daily, monthly or seasonal fluctuations in usage, increased or decreased usage, extreme weather and/or similar events. D pays C a “firm energy charge/payment” each month based on the MWh delivered in the prior month times a firm energy charge of $77.00/MWh. The firm energy charge/payment represents a prevailing market-based price when the transaction was executed. In addition to the firm energy charge, and depending on the geographic region and PJM RTO market requirements, full requirements service means C will be responsible for either generating or purchasing electric energy and related “commodities” (e.g., fuel, emissions allowances, etc.), firm transmission service to the RTO, RTO capacity/reserves, RTO ancillary services, line losses, energy scheduling, and RTO congestion charges. If D owns one or more generation units, C may also operate, dispatch and maintain that unit, and charge D for electric energy and related services under the full requirements agreement “net” of an actual or assumed operating profile for that unit.

B. Generation Capacity

Example 1 - Bilateral Capacity (outside the geographic “footprint” of an RTO)

Federal power agency E sells to municipal electric utility F (a “preference” customer of such Federal power agency, both located in the southeast U.S.), 25,000 kilowatts of Firm Capacity (or “dependable capacity”) and 1,500 kilowatt hours of energy for each kilowatt of dependable capacity each year from its hydro generation reservoir projects located in the southeast U.S. for a term of 20 years. F plans to use the energy to supply a portion of its expected electric retail load during such term. The energy made available for a contract year can be scheduled monthly at F’s discretion. However the maximum amount scheduled in any month shall not exceed 240 hours per kilowatt of F's contract demand, and the minimum amount scheduled shall not be less than 60 hours per kilowatt of F's contract demand. F will pay Federal power agency E each month for capacity and energy made available and delivered the prior month in accordance with a wholesale power rate schedule formula in the supply contract. The rates and charges are subject to adjustment by E every 5 years.

Example 2 - Bilateral Capacity (Short term - outside the geographic “footprint” of an RTO)

Municipal electric utility X sells to municipal electric utility Y (both are located in the southeast U.S.), 100 MW of Firm Capacity and a call option on 100 MW of fixed price, Firm LD energy each year from its system generating assets and purchase power contracts for a term of 2 years. Y plans to use the energy to supply a portion of its projected electric retail load during such term. The energy made available for a contract year can be scheduled (the option exercised) on a business day-ahead basis at Y’s discretion; however the amount scheduled in any such option exercise shall be 100 MW per hour for all hours of the day. Y will pay X each month for capacity whether or not Y exercises the call option for electric energy during the prior month. Y will pay X for energy delivered the prior month in accordance with the fixed price call option terms.

Example 3 --“Capacity” in a particular RTO market (“pure” RTO capacity, no energy)

Generation and transmission cooperative G sells to generation and transmission cooperative H, 20 MWs (14,400 MWhs) of June 2011 Midwest Independent System Operator (“MISO”) Aggregate Planning Resource Credits (“APRCs”). One APRC represents one megawatt (“MW”) of “unforced capacity,” as defined in the MISO Tariff on file with FERC, which qualifies the holder of such APRC to satisfy the resource adequacy requirements of Module E of the MISO Tariff. H will use the capacity to meet a portion of its expected resource adequacy requirements in MISO (where it is a “generation owner” and therefore subject to the resource adequacy requirements), based on its projected peak electric load for the month of June 2011. The forward transaction was executed in April 2011 at a price of 35¢/MW-Month. G will invoice H for the APRC within 5 days of G transferring the capacity quantity represented by the APRC to H on MISO’s electronic Module E Capacity Tracking tool (MECT). Payment will be due 5 business days after H’s receipt of the invoice. When determining June 2011 MISO market settlements, MISO will credit H will the APRCs transferred from G. Note that participation in MISO’s capacity auction is currently voluntary. If a generation owner has inadequate Module E Capacity, the deficiency is settled by MISO via a punitive penalty on an after-the-fact basis. In July 2011, MISO filed a new resource adequacy mechanism via tariff with FERC, seeking to implement a one-year forward mandatory capacity requirement, proposed to begin for planning year 2013-14. MISO is awaiting a FERC response on this tariff filing. Holders of outstanding “forward capacity contracts” which are or were executed bilaterally in years prior to the FERC tariff change becoming effective have agreed (in consultation with MISO) that certain changes would be appropriate to modify the terms of outstanding “forward capacity contracts” in MISO.

C. Transmission Services

Federal power agency K sells to G&T cooperative J 100 MWs of monthly “firm point-to-point transmission service” from location X to location Y in the southeast U.S. for a term of 3 months at the tariff rate of $2,000/MW-Month for a total transaction value of $600,000. The geographic area in which such transmission service takes place is outside the “footprint” of an RTO, and therefore the transmission service is reserved on the Open Access Same Time Information System (“OASIS”) website of the transmission owner, K. J intends to use the transmission service to deliver wholesale electric power to its distribution cooperative member-owners to supply a portion of its distribution cooperative constituents’ retail electric load.

D. Fuel delivered

Joint power agency L supplies to municipal utility M a long-term supply of natural gas from a natural gas project (Project Entity Z) developed by L and other NFP Electric Entities for the purpose of fueling L’s and M's (and other NFP Electric Entity owners of Project Entity Z’s) natural gas-fired electric generating facilities in the California ISO

market. M pays L for the cost of acquiring, developing and improving the natural gas Project Entity Z through direct “capital contributions” to Project Entity Z. In addition M pays L a monthly fee for the natural gas supplied from the natural gas project, composed of an operating cost fee component, an interstate pipeline transportation cost fee component and an operating reserve cost fee component. The natural gas-fired electric generating facility is to be used by M to supply a portion of its expected retail electric load.

E. Cross-Commodity Transactions (including Options)

Generation and transmission cooperative N buys from electric utility district P the option to the full output from three units of P’s diesel power generation unit located in the geographic region administered by the MISO RTO market for an 8 year term at a strike price that is based upon a location-specific Oil Price Information Service (OPIS) No. 2 fuel oil price plus $.01/gallon times a volumetric conversion factor and a heat rate (thermal efficiency) conversion factor, in addition to a variable operation and maintenance charge for the diesel unit. In addition, N pays P a monthly capacity fee per kW-month. N must provide a minimum of 4 hours advance notice to P to request start-up of the diesel units. The facility shall then be available to operate at the request of N for 300 hours per purchase year. N plans to use the output from the plant if and when the option exercise and payments are “economic” (as compared to the prevailing market price of power) to supply a portion of its expected retail electric load.

F. Other Goods and Services Agreements, Contracts and Transactions

Example 1 – Complex operations-related agreements related to a jointly-owned project.

Municipal utility O acts as operator of a 2000 MW natural gas-fired electric generating station (5 units). The generating station is owned 50/50 by municipal utility O and neighboring generation-owning distribution cooperative P (both are NFP Electric Entities). Municipal utility O also has 10 other natural gas-fired electric generation units, along with other assets. Cooperative P has only one other generating unit, and it burns coal. Because municipal utility O regularly transacts in the natural gas markets, municipal utility O has agreed with cooperative P to buy natural gas to be delivered to the jointly-owned station. Municipal utility O will, essentially, "allocate" to the jointly-owned station a portion of its natural gas assets (owned and purchased), along with its pipeline (transportation) contracts and natural gas storage contracts. It will also “allocate” to the jointly owned station and, therefore, to cooperative P as a joint owner, the economic benefit of any Electric Operations-Related Transaction (fuel hedge) that it enters into. Each of the two NFP Electric Entities -- municipal utility O and cooperative P -- will pay for their allocable share of the natural gas DELIVERED to the jointly-owned station that is attributable to the amount of electric energy the respective entity uses from the jointly-owned station. In addition, as joint owners, municipal utility O and cooperative P will pay for natural gas maintained in storage to be available to the jointly-owned station.

To effectively allocate the costs and benefits between municipal utility O and cooperative P, municipal utility O will put in place an agreement, contract or transactions (or a commercial arrangement) that will financially allocate between the NFP Electric Entities the costs of the jointly owned station (along with whatever financial hedges municipal utility O put in place). It is allocating to cooperative P the " delivered, as well as the fuel basis or exchange" by means of a cash payment arrangement. All the transactions are directly connected to the delivery of natural gas to the jointly-owned generation station, which then generates electric energy as needed to provide electric service to the consumers served by municipal utility O and cooperative P.

The operating agreement for the generation station may also allow municipal utility O to sell excess power from the jointly-owned station (not required by the owners of the station) to third parties for the benefit of the owners of the station. The revenues from these sales might be shared on a 50/50 basis between the joint owners of the station, or municipal utility O may be allocated 55% of the revenues because it is providing the service to cooperative P to manage sale of the excess power generated by the station.

If the parties agreed, municipal utility O could also agree to assume a "full requirements" arrangement with cooperative P, utilizing cooperative P's coal assets and coal-burning generating unit, and deciding based on "economic dispatch" principles how to provide cooperative P with all the electric power needed to serve P's varying load obligations over time from both the coal-burning unit and the jointly-owned unit. Some aspects of the complex project relationship between O and P may viewed as "financially-settled," as O may have the sole decision-making power to shut down P's coal unit and generate power only from the jointly-owned unit, or to "swap" between O and P a measure of electricity generated by the coal unit for a measure elsewhere in O's portfolio generated by wind or some other renewable resource (for environmental compliance or reliability reasons)with appropriate financial payments between the two NFP Electric Entities Quantities (or volumes), timing and other aspects would contain significant "optionality" or variability.

The exemptive order sought would exempt from the CEA all the transactions/arrangements/etc. between municipal utility O and cooperative P, both NFP Electric Entities. The exemptive order would NOT affect transactions that municipal utility O might execute with other third party entities (non-NFP Electric Entities) on behalf of the project entity or the joint owners.

Example 2 – Renewable energy resources

Joint Power Agency R purchases a wind farm on behalf of three municipal utilities X, Y, and Z. The municipal utilities receive a proportionate share of the wind production based on their ownership share in the project. R arranges firm and non-firm transmission service for delivery of the energy to X, Y, and Z and schedules the energy as forecasted. X, Y, and Z have arranged with R for energy to be received according to the forecast, in spite of any deviations from the forecast for the actual output of the wind farm. Because wind conditions nearly always deviate from the wind forecast, and consequently the wind farm output often deviates from the generation forecast,

including periods where wind conditions are inadequate and produce no energy as forecasted, R arranges to deliver to X, Y and Z the difference in power produced by the wind farm and the forecast (balancing the actual delivery of energy to X, Y and Z to the generation forecast with other generation resources or market transactions) to meet the schedule. R will use the cost of energy produced or market prices for incremental power purchased to charge X, Y, and Z for the imbalance energy that it produced or procured to perform such balancing services.

Example 3 – Electric Transmission RTO/ISO Interface Services

Municipal electric utility A is located in the geographic region administered by the SPP RTO and is provided a "Municipal Utility A MISO Interface" transaction point by the MISO RTO. Municipal electric utility B is located in the geographic region administered by the MISO RTO. Municipal Utility A sells physical energy bilaterally (with transmission arranged via e-tag) to Municipal Utility B at the "Municipal Utility A MISO Interface". The market path and settlement of this transaction would be Municipal utility A > Municipal Utility B > MISO. Similarly, Municipal electric utility A may sell to Municipal electric utility B at the "Municipal utility A MISO Interface" transaction point via MISO Finsched. The settlement of this transaction would be MISO > Municipal Utility A > Municipal Utility B > MISO. In each case, one NFP Electric Entity may arrange transmission services for the other NFP Electric Entity by arrangement between the two entities.

G. Environmental rights, allowances or attributes required to operate the entity's electric facilities, or to fulfill the entity's regulatory requirements

Municipal utility T is located in the geographic region administered by the PJM RTO. T buys from municipal utility U, 15 Annual NOx Allowances of "vintage year" 2011 or earlier. The price for these allowances is $400/Allowance for a total transaction price of $6,000. T intends to use the allowances to comply with a portion of the Federal limitations on NOx emissions that would otherwise restrict T's right to operate its coal-fired generating plants in 2012. T's coal-burning plants run primarily to supply a portion of T's expected electric retail load in PJM.

EXHIBIT 3

Order of the Commodity Futures Trading Commission Exempting Specified Agreements, Contracts and Transactions Under Section 4(c)(6) of the Commodity Exchange Act

(a) Scope.

This Order of Exemption shall apply to any contract, agreement or transaction retroactive to the enactment of the Dodd-Frank Act, outstanding now, or that may be executed in the future: (1) that is an Electric Operations-Related Transaction; and (2) that is entered into ***between*** NFP Electric Entities.

(b) Definitions.

(1) "Electric Operations-Related Transaction" shall mean any agreement, contract or transaction involving a "commodity" (as such term is defined in the CEA) and whether or not such agreement, contract or transaction is a "swap," so long as the NFP Electric Entity is entering into any such agreement, contract or transaction "to hedge or mitigate commercial risks" (as such phrase is used in CEA Section 2(h)(7)(A)(ii)) intrinsically related to the electric facilities or electric operations (or anticipated facilities or operations) of the NFP Electric Entity, or intrinsically related to the NFP Electric Entity's public service obligation to deliver reliable, affordable electric energy service to electric customers. For the avoidance of doubt, "intrinsically related" shall include all transactions related to (i) the generation, purchase or sale, and transmission of electric energy by the NFP Electric Entity, or the delivery of reliable, affordable electric energy service to the NFP Electric Entity's electric customers, (ii) all fuel supply for the NFP Electric Entity's electric facilities or operations, (iii) compliance with electric system reliability obligations applicable to the NFP Electric Entity, its electric facilities or operations, (iv) compliance with energy, conservation or renewable energy or environmental statutes, regulations or government orders applicable to the NFP Electric Entity, its electric facilities or operations, or (v) any other electric operations-related agreement, contract or transaction to which the NFP Electric Entity is a party. Electric Operations-Related Transactions shall ***not*** include agreements, contracts or transactions executed, traded, or cleared on a registered entity, nor shall such defined term include an agreement, contract or transaction based or derived on, or referencing, a "commodity" in the interest rate, credit, equity or currency asset class, or of a product type or category included in the "Other Commodity" asset class that is based or derived on, or referencing, metals, or agricultural commodities or crude oil or gasoline commodities of any grade not used as fuel for electric generation.

(2) NFP Electric Entity means (i) the United States, a State or any political subdivision of a State, or (ii) an "electric cooperative" that receives financing under the Rural Electrification Act of 1936 (7 U.S.C. 901 et seq.) or that sells less than 4,000,000 megawatt hours of electricity per year, or (iii) any other electric cooperative, whether or not such electric cooperative meets the requirements of clause (ii) above, or (iv) any

agency, authority, instrumentality or department of any one or more of the foregoing, or a federally-recognized Indian tribe, or (v) any entity which is wholly owned, directly or indirectly, by any one or more of the foregoing. For purposes of this definition, an “electric cooperative” shall mean an "electric membership corporation" or an "electric power association" organized under State law, a “rural electric cooperative,” “cooperative providing electric services to consumers and farmers” or any similar entity referenced in other Federal, State and local laws and regulations, so long as any such entity is formed and continues to operate for the primary purpose of providing electric service to its members on a not-for-profit, cooperative basis, and is treated as a cooperative under the Federal tax law.

(c) Exemptive order.

The Commission, pursuant to section 4(c)(6) of the Commodity Exchange Act, as amended (the “Act”), in accordance with applicable provisions of section 4(c)(1) and 4(c)(2), hereby exempts Electric Operations-Related Transactions entered into between NFP Electric Entities and any other person or class of persons rendering advice, or rendering other services with respect thereto, from all provisions of the Act and Commission regulations, as provided for under section 722(f) of the Dodd-Frank Wall Street Reform and Consumer Protection Act, 15 U.S.C. 8308.